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TRANSCRIPT OF RECORD

Supreme Court of the United States
OCTOBER TERM, 1960

No. 56

SAM FOX PUBLISHING COMPANY, INC., ET AL., APPELLANTS,

228.

UNITED STATES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

FILED MARCH 14, 1960
PROBABLE JURISDICTION NOTED MAY 23, 1960

SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1960

. No. 56°

SAM FOX PUBLISHING COMPANY, INC., ET AL., APPELLANTS,

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

VS.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS

June 29, 1959—February 8, 1960

EXTRACTS OF DOCKET ENTRIES

1050 Filed Show cause Order re-

June	29, 1959	riled	of Consent further amended judgment:—ret. 10/19/59, Room 129, 10 A.M. (ASCAP to mail copy, etc.) Transcript of record of proceedings of June 19, 1959.
July	6, 1959	et	Consent Order re: License Agreement and Fee, etc. (See Order). —Ryan, J.
July	17, 1959		Affidavit of service of documents to all members of ASCAP, etc. by deponent American Society of Composers, etc.
August	13, 1959		Consent Order (Re: Background Music et al.). License fee found reasonable, etc.—Ryan J. Mailed notice of entry 8/12/59.
August	28, 1959	"	Affidavit and Notice of Motion (by Sam Fox Publishing) for answers to interrogatory) returnable 9/1/59.
September	1, 1959	a	Memo Endorsed: Referred to Judge Ryan—Dimock J.

September	2,	1959	Filed	Filed Plaintiff's Memo in support of further amended judgment— Memo endorsed. Clerk directed to file within brief, etc.—Ryan J.
"	3,	1959	.4	Transcript of Record of proceedings of June 29, 1959
*	3,	1959	. 46 .	Transcript of Record of proceeding of July 7, 1959.
"	2,	1959	•	2nd Memo endorsed: Adj'd at request of Government to 9/8/59 at 2:30 P.M.—Ryan, J.
	8,	1959	• • • • • • • • • • • • • • • • • • • •	3rd Memo endorsed: Motion with- drawn, etc. (see memo) So Or- dered—Ryan, J.
"	21,	1959		Order—Society shall issue interim licenses as indicated in order—Ryan J. (see order).
October	7,	1959	. "	Order on Consent approving li- cense fees, etc. Ryan, J.
"	8,	1959		Consent Order Amending "Weighting Formula" attached to show cause dated 6/29/59 as indicated—Ryan, J.
"	7,	1959	•	Stipulation and Order amending Schedule A to amended appearance filed by McGoldrick, D, H. & G. of 2/26/59, etc.—Ryan J.
"	9,	1959	46	Affidavit of Arnold Saemann.
"[fol. 2]	9,	1959	"	Affidavit of Edward Rosenberg.
• "	13,	1959		Affidavit and Notice of Motion by Sam Fox Publishing et al. to in- tervene ret. 10/19/59, 10 A.M. be- fore Ryan, J.
			. 2	

October	16,	1959	Filed	Affidavit of mailing to ASCAP members.
November	r 16,	1959	"	Unsigned Order (H.C.).
44	16,	1959	44	Unsigned Order (H.C.) with letter attached.
	. 16,	1959	•	Order denying motion of Sam Fox Publishing et al. for leave to intervene—Ryan, J.
	18,	1959	"	Affidavit and Exhibit of Arnold Saemann of Service by mail of proposed Amendments to AS-CAP Articles of Association, etc.
"	.18,	1959	"	Affidavit of Edward Rosenberg of Service by mail of copies of Exhibit A to F as attached hereto.
	20,	1959	" \	Petition for licenses for right of public performance of compositions in ASCAP repertory by radio and television stations in State of Washington, etc.
•	20,	1959	- "	Exhibit and Order directing issuance of licenses to petitioners for their respective radio stations in State of Washington, etc. Ryan, J.
"	20,	1959	44	Stipulation on issuance of license by respondent as indicated.
"	27,	1959	"	Exhibit & Order designating Jerime I. Golinko & Co. to assist Mr. Herman Finkelstein on vote of members on proposed consent orders per their amending amended final judgment entered 3/14/50 as set forth in Ex. A hereto—Ryan, J.

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November	30, 1959	Filed	Affidavit & Exhibits A, B, C, D of Arnold Saemann of service by mail.
December	17, 1959	66 *	Affidavit & Exhibits of Herman Finkelstein and Aaron A. Map- pen on ballots.
January	5, 1960	46	Affidavit of Howard T. Milman et al. re letters as per exhibit annexed.
"	5, 1960	"	Affidavit of Herman Finkelstein re deductions of advertising agency commissions.
. "	5, 1960	"	Affidavit of Herman Finkelstein re acquainting court on issues for conference.
"	5, 1960	"	Affidavit of Emanuel Dannett re in opposition to Herman Finkelstein's affidavit.
	5, 1960		Herman Finkelstein affidavit.
" [fol. 3]	5, 1960		Affidavit of Hal David re constituting the Current Writers Comm.
"	5, 1960	44	Stip. & Order adding and dropping parties in Schedule A. annexed to amended appearance entered 2/28/59 & final order not to apply to 2 petitioners listed in Schedule B—Ryan, J.
"	5, 1960	"	Final order approving forms of license agreement for a term of 5 years commencing January 1, 1959 as per Exhibit "I" and "2" annexed and comply with terms of amended final judgment, etc.—Ryan, J.
. 1			,

January	7, 1960	Filed	Affidavit of Herman Finkelstein pursuant to Court instructions on hearing held 10/20/59 (pages 355-361 of minutes) marked Exhibit "D".
	7, 1960	"	Oath of Tellers, Reinhold Dreher, et al. marked Exhibit "F".
44	7, 1960	"	Affidavit of Herman Finkelstein with respect to receipt and handling of ballots marked Exhibit "B".
	7, 1960	"	Copy of affidavit of Herman Finkelstein marked Exhibit "A" pursuant to court's instructions on pages 353-354 on minutes of hearing held 10/20/59.
	7, 1960	**	Memo of proposed tabulating procedure to be followed in Court 1/6/60 marked Exhibit "C".
	7, 1960		Telegram from Bob Davis to Judge Ryan dated 1/6/60 marked Exhibit "F.".
"	7, 1960	"	Exhibit "G"-Summary of AS-CAP Balloting.
44	7, 1960		Exhibit "H"—Summary of AS-CAP Balloting.
.46	7, 1960	44	Exhibit "I"—Tabulation sheets on vote—Count 1.
44	7, 1960	••	Exhibit "J"—Tabulation Sheets on vote—Count 2.
	7, 1960	"	Exhibit "K"—Certification by ASCAP of submission of proposed consent further amended final judgment.
	7, 1960	"	Application for determination of a reasonable fee.

January	7, 1960	Filed	Affidavit of Howard T. Milman & Exhibits.
"	7, 1960	44	Affidavit and notice of motion to determine reasonable fee returnable 7/7/59.
July	7, 1959	5	Memorandum Endorsed on notice of motion filed 1/7/60 dismissing this part of proceedingRyan, J.
January	7, 1960	**	Second Memorandum endorsed on Notice of Motion filed 7/7/59—matter having been settled attached petition withdrawn. So ordered—Ryan, J.
; "	7, 1960	49	Order adjudging that Article VII of proposed consent order has been complied with and effective date of said consent order is 1/7/60—Ryan, J.
	7, 1960	. "	Order directing tabulations and ballots be scaled in appropriate containers, etc.—Ryan, J.
•	7, 1960	••	Consent Order amending proposed consent further amended Final Judgment attached to show cause order dated 6/29/59 as indicated herein.—Ryan, J.
	7, 1960	44	Order appointing Hon. John E. McGeehan and Honorable Irving M. Ives to examine the design and conduct of survey in Sec. II of consent order and report and ASCAP to pay reasonable expenses and salaries—Ryan, J.
	7, 1960		Consent and Order on issues of Fact or Law on Amended Final Judgment—Ryan, J.

January	15,	1960	Filed	Filed transcript of record of proceeding for Jan. 6, 7, 1960.
**	7,	1960	" .	Filed Opinion #25676 to sign
	٠.	•		proposed consent decree further Amending the amended final con- sent judgment entered 3/14/50
		;		(which amended the final consent judgment of 3/4/41)—Ryan, J.
	29,	1960	"	Plaintiff's cross-designation.
February	1,	1960		Defendant ASCAP cross-designation.
January	14,	1960		Notice of Appeal of Sam Fox Publishing Co. Inc. et al. from order of 11/16/59 denying inter-
• *			* '	vention to Supreme Court of United States.
February	8,	1960	4	Affidavit & Order directing Clerk to transmit to Clerk of Supreme Court of United States all of original papers specified in designations of applicants in Intervention and plaintiff and defendant as contained in their notice of appeals and cross-designation,
	•			etc.—Ryan, J.

[fol. 5]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 13-95

UNITED STATES OF AMERICA, Complainant

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL., Defendants

COMPLAINT—Filed February 26, 1941

The United States of America, by Matthis F. Correa, its attorney for the Southern District of New York, Thurman Arnold, Assistant Attorney General, Victor O. Waters, Special Assistant to the Attorney General, and Warren P. Cunningham, Special Attorney, acting under the direction of the Attorney General, files this its petition in equity against the following named defendants and for cause of action alleges:

1

Description of Defendants

- 1. That American Society of Composers, Authors and Publishers, hereinafter referred to as "Society," an unincorporated membership association of music composers, authors and publishers, which has its principal office at 30 Rockefeller Plaza, New York, New York, is made a defendant herein.
- [fol. 6] 2. That Gene Buck, president, George W. Meyer, secretary, and Gustave Schirmer, treasurer, of the American Society of Composers, Authors and Publishers, during the times hereinafter mentioned, who have been or are now active in the management of the Society, or in the direction of the activities hereinafter described, are made defendants herein.

3. That the members of the Society other than those members thereof specifically named herein constitute a group so numerous that it would be impractical to bring all of them on before the Court by name; therefore, the aforesaid defendants named and described herein are sued as representing all members of the Society.

II

· The Society

4. That defendant Society, an unincorporated association, was organized in or about the year 1914, by the leading publishers, composers and authors of musical compositions in the United States, for a period of ninety-nine (99) years from the date of its organization; that the purposes for which it was organized were, among other things, to grant licenses and collect royalties for the public . performance of the works of its members, to allot and distribute the royalties collected, and to accumulate and maintain a reserve fund to be used in carrying out any of the objects of the Society; that its membership at the time of the filing of this Complaint consists of approximately 140 publishers and 1,200 composers and authors and includes the owners of the copyrights of a substantial amount, more than 75 percent; of all the copyrighted musical compositions demanded by the public of the United States for entertainment purposes at the time of the filing of this [fol. 7] Complaint and for a number of years prior thereto; that the management of defendant Society is vested exclusively in a self-perpetuating board of directors consisting of 24 persons, 12 of whom represent publisher members, 6 represent composer members, and 6 represent author members; that each director is elected to serve for a period of three years, and is eligible for reelection upon the expiration of his term; that the terms of office of eight members of said board expire each year, and their successors are elected annually by the remaining members of the board; that the directors have exclusive and absolute control of the management and of all activities of the Society and appoint all its committees, officers and employees; that admission to membership in the Society is by

election thereto by the board; that each member upon admission must execute an agreement in the form required by the board of directors, assigning to the Society the exclusive nondramatic public performance for profit rights of all of the members' works for the period of any then existing agreement between the Society and its members; that by reason of the vast number of copyrights of compositions controlled by the members of the Society, by reason of the great public demand therefor, and by reason of the vesting of the absolute management and control of all activities of the Society in the self-perpetuating board of directors, the twenty-four persons constituting such board have the power to and do fix the price of and control the public performance for profit rights of the greater part of the music demanded by the public of the United States for entertainment purposes.

- 5. That licenses to perform publicly for profit the musical compositions copyrighted by its members are issued by the Society upon application therefor; that agents of [fol. 8] the Society solicit applications for such licenses by threat of prosecution for infringement of the copyright laws of the United States, from all unlicensed persons, firms or corporations in the United States who use music in connection with their business; that defendant Society refuses to grant licenses to perform single musical compositions or groups of compositions selected by the licensees; that it grants only blanket licenses to perform any and all musical compositions of all its members upon the payment of such royalty as is demanded by the board of directors of the Society.
- 6. That defendant Society maintains agents and representatives throughout the United States, whose duty it is to enforce the demands of the Society in the sale of licenses and in collecting royalties therefor.

Щ

The Radio Broadcasting Industry

7. That the term "radio broadcasting station" is used herein to designate those radio stations operated for the

entertainment of the residents of the United States and residents of adjacent and more distant foreign countries; that there are approximately 793 such radio broadcasting stations interspersed throughout the states of the United States and operated under authority of the Federal Communications Commission, pursuant to the Act of Congress known as the Communications Act of 1934, approved June 19, 1934, and prior Acts of Congress; that each station is required to broadcast a minimum regular operating schedule of two-thirds of the hours it is authorized to broadcast under the license granted it by the Communications Commission; that the continued existence, success and [fol. 9] prosperity of a radio broadcasting station depends entirely upon the entertainment offered by it to the radio listening public within the range of the station's power; that music is the principal form of entertainment demanded by the radio listening public and must be offered by a station in order to retain the continuing interest and patronage of the listening public; that approximately 50 percent of the time devoted to the transmission of energy. ideas and entertainment across state or national boundaries by radio broadcasting stations in the United States is devoted to the radio broadcasting of music in varying forms, and such music must represent the rendition of compositions most desired by the listening public; that the only income available to a station is derived from the sale of its facilities to persons desiring to communicate energy. ideas and entertainment to the public within listening range of the station's transmission power; that such sale of facilities consists primarily of sales to business concerns for the purpose of advertising the products of the particular concern and of creating good will on the part of the public for the services or products of the advertiser; that the desirability of a particular station for advertising purposes is directly dependent upon the number of persons listening to the programs broadcast by that station, and such persons can only be induced to listen to the station's broadcasts by furnishing the musical entertainment demanded by the radio audience; that a substantial portion of the entertainment furnished by the station must be

furnished at the expense of the station, for which it receives no compensation or income.

8. That during all the time herein mentioned it has been and is essential to the continued operation of each of the [fol. 10] stations in the United States broadcasting radio entertainment, in order to avoid liability for infringement of copyright, to obtain the permission or license of the owners of the copyrighted musical compositions the public performance of which is demanded by the radio audience.

IV

The Interstate Commerce Involved

. A. In radio broadcasting

- 9. That radio broadcasting stations in the United States are engaged in interstate or foreign commerce; that each station is an instrumentality through which energy, ideas and entertainment are transmitted across state or national boundaries to the radio listening population of the United States or foreign countries: that approximately 40 percent of the time devoted to the transmission of energy, ideas and entertainment across state or national boundaries by radio broadcasting stations in the United States has been devoted to the radio broadcasting of copyrighted musical compositions owned or controlled by the Society and its members; that as each radio station under the copyright laws must obtain permission from the copyright owners of musical compositions before such compositions can be broadcast in interstate commerce, any interference with or restraint upon the obtaining of such permission from the copyright owners upon a competitive basis restrains the interstate and foreign transmission of energy, ideas and entertainment by radio broadcasting stations.
- 10. That there has developed in the radio industry a practice which is commonly called "chain" or "network" broadcasting; that by this method of operation several radio broadcasting stations are connected in a chain or [fol. 11] network by means of leased telephone lines for the purpose of broadcasting simultaneously radio programs

originating at one of the stations in the network; that this method is generally inaugurated and controlled by what is known as a network company; that the principal network companies presently existing in this country are the National Broadcasting Company, the Columbia Broadcasting System, and the Mutual Broadcasting System; that approximately 350 radio stations located in the United States are affiliated with and engaged in such "network" broadcasting; that only those network stations which originate network programs have control over the selection of the content of the programs which are broadcast simultaneously by all of the stations in the network; that approximately 45 percent of the total time devoted to network broadcasting in this country is devoted to the broadcasting of musical compositions; that a substantial number of the copyrighted musical compositions performed over radio networks during the period covered by the Complaint were owned or controlled by the Society and its members; that the net work stations other than those originating network broadcasting have no control whatsoever over the selection of the musical compositions which are performed by the several stations comprising the network.

·B. In sheet music

- 11. That each defendant who is a publisher member of defendant Society prints, or causes to be printed, the music and lyrics, and special arrangements thereof, of musical compositions; that such printed sheets of music are sold by such defendants to customers located in all states of the United States and are transported across state [fol. 12] boundaries in interstate commerce; that the greater part of the musical compositions broadcast by radio stations is performed by entertainers located in the studio of particular broadcasting stations, or in close proximity thereto, from musical scores transported across state boundaries.
- 12. That the essential element in effecting the sale and distribution of sheet music throughout the United States is the transmitting of musical compositions to the ear of the public, in order to create a desire on the part of in-

dividual members of the public to purchase the printed score representing particular compositions; that radio broadcasting is the principal medium through which individual musical compositions are transmitted to the ear of the purchasing public and a demand for the printed score created; that by means of the combination and conspiracy hereinafter described, defendant Society through the issuance of only blanket licenses authorizing the performance of the Society's entire repertoire of music at a price which requires the payment of a percentage of the revenue derived from all radio programs regardless of whether Society owned or controlled music is performed, has destroyed the economic incentive on the part of radio stations, having the Society's license, to perform the musical compositions of authors, composers and publishers not members of Society, thereby depriving those owners of copyrighted musical compositions who are not members of defendant Society of the opportunity of transmitting their musical compositions to the ear of the purchasing public, with the result that the sale of scores written by nonmembers to purchasers in states of the United States other than the state where such scores were manufactured. and the transportation thereof across state and national boundaries, is and has been restrained.

[fol. 13] C. Motion picture films

13. That motion picture films are produced primarily in the States of New York and California, and shipped to motion picture exhibitors located in every state in the United States; that these motion picture films are produced and shipped in interstate commerce for the sole and exclusive purpose of exhibition or public performance by motion picture exhibitors; that without the right to exhibit or perform, the motion picture films are rendered valueless and restricted from a free flow in interstate commerce; that a substantial portion of the motion picture films are synchronized with music to the extent that the films cannot be exhibited without performing the music synchronized therewith; that a great majority of the music synchronized with the films is copyrighted music, the public performance

for profit rights of which are controlled by the Society; that the Society, therefore, has the power to fix the price of, control or otherwise unreasonably restrain the usage of a substantial portion of the motion picture films passing in interstate commerce.

D. Electrical transcriptions

14. That electrical transcriptions are mechanical devices upon which programs are recorded or mechanically reproduced for the exclusive use of radio broadcasting stations; that more than 50 percent of the electrical transcriptions produced in the United States are produced or manufactured in the States of New York and California and shipped to radio broadcasting stations located throughout the United States; that upon practically all of these [fol. 14] electrical transcriptions are recorded musical compositions; that a substantial portion of the music so recorded is copyrighted music owned or controlled by the Society and its members.

V

The Combination and Conspiracy

15. That for many years preceding as well as during the period of three years next preceding the filing of this Complaint, and continuing to the date of the filing thereof, defendants, and others to the United States Attorney unknown, well knowing the foregoing facts, have been engaged in the United States, and particularly in the Southern . District of New York, in a wrongful and unlawful combination and conspiracy in restraint of the aforesaid interstate and foreign trade and commerce in radio broadcasting, sheet music, motion picture films, and electrical transcriptions in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (U.S.C.A., Title 15, Section 1), commonly known as the Sherman Act, and have conspired to do all acts and things and to use allemeans necessary and appropriate to make said restraints effective, including the means, acts and things hereinafter more particularly alleged and other

means, acts and things which at the time of filing this Complaint are unknown to the United States Attorney; that as a part of said conspiracy the defendants have arranged and agreed among themselves to do the following things.

A. To create, maintain and utilize defendant Society as an instrumentality for promoting and maintaining the illegal combination and conspiracy herein described; to create defendant Society as such instrumentality with [fol. 15] a self-perpetuating board of directors and to vest in the twenty-four persons constituting such board the exclusive power to control the activities of defendant Society; to restrict membership in defendant Society to such composers and authors who have written or composed and had regularly published not less than five copyrighted anusical compositions, and to such publishers as may be approved by the board of directors; to have transferred to and to pool in defendant Society the sole and exclusive right to perform publicly for profit all musical compositions of which all the members of Society are the copyright proprietors, or which any member, either alone or jointly or in collaboration with others, wrote, composed, published, acquired or owned, or in which any member has any right, title, interest; or control whatsoever, in whole or in part, or which any member during the term of the agreement may write, compose, acquire, own, publish or copyright, either alone, jointly, or in collaboration with others, or in which any member may at any time, during the term of the agreement, have any right, title, interest or control, either in whole or in part; to have all members of defendant Society vest in defendant Society absolutely until and including December 31, 1940, the sole and exclusive right to license others to perform publicly for profit all their musical compositions; to renew and extend the agreements between Society and its members which expired December 31, 1940, for a further ten-year period.

B. To vest in defendant Society a complete monopoly of the right to license for public performance for profit all the musical compositions of all its members, aggregating an unknown number of musical compositions; to refuse

to furnish to its licensees complete lists of the musical [fol. 16] compositions in the Society's repertoire of music; to eliminate competition among members of defendant Society in the sale of rights to perform publicly their respective musical compositions, which, but for the illegal combination and conspiracy herein described, would have existed; to refuse radio broadcasting stations, advertisers (desiring to utilize the service of such stations to promote the sale of their merchandise), orchestras, theatres, and others desiring the right to perform publicly the copyrighted musical compositions of members of defendant Society, the right to acquire from the individual members of the Society the public performance for profit rights of their respective copyrighted musical compositions; to require commercial users desiring only certain musical compositions in the Society's repertoire to accept a blanket license from defendant Society for all of its copyrighted musical compositions, upon terms and conditions arbitrarily fixed by it.

C. To agree to establish and maintain, and pursuant to such agreement, to establish and maintain, by means of the pooling of their individual copyright monopolies, enhanced and non-competitive prices or royalties for licenses to perform publicly copyrighted musical compositions owned and controlled by individual defendants: to eliminate all competition among members of defendant Society in the sale of licenses to perform publicly their individual musical compositions and to exercise the power obtained by defendants through the unlawful pooling of their individual copyright monopolies, by concertedly refusing to license the public performance by radio broadcasting stations and all other persons engaged in the public performance for profit of copyrighted music of any copyrighted musical composition owned and controlled by a member of defendant Society, except on the basis of a [fol. 17] general license covering any and all musical compositions of all members and except upon the basis of an arbitrary royalty for such general license, fixed and determined by the aforesaid self-perpetuating board of directors of defendant Society; to require compliance with

the terms fixed by the defendants by radio broadcasting stations affiliated with radio "networks," prior to December 31, 1940, by issuing licenses to network affiliated radio stations only on the basis that the license issued to each station was not to be construed as authorizing the licensee to grant others any right to perform publicly for profit by any means, method or process whatsoever. The radio stations affiliated with a radio "network," other than the station originating the radio program, have had no control over the copyrighted musical compositions performed by the network affiliated stations simultaneously. casting stations affiliated with radio "networks" have had to accept a license from defendant Society upon any terms and conditions imposed by defendant Society, or subject themselves to numerous infringement suits in which they would be compelled to pay not less than \$250 for each copyright infringement, as provided in the copyright laws of the United States.

D. Concertedly to demand and receive from radio broadcasting stations increased amounts as royalties for licenses to perform publicly copyrighted musical compositions owned and controlled by members of defendant Society; to notify on or about April 1, 1932, all radio broadcasting stations throughout the United States that, on and after June 1, 1932, defendant Society would issue to broadcasting stations only a general license covering all musical compositions of all members of defendant Society, which license [fol. 18] would require the payment annually as royalty of a sum approximately equal to the annual royalty theretofore paid by them, and in addition thereto, 5 percent of the gross income of the broadcasting station from whatever source derived. This fee represented an increase of approximately 400 percent in so-called "royalty" payments over the aggregate royalty demanded for the previous year. Protests were made by the broadcasting stations to defendant Society and the then existing licenses were temporarily extended to September 1932. Thereupon efforts were made by the broadcasting stations, acting through a committee appointed for the purpose, to obtain licenses providing for royalty payments by each station

based on the number of performances by such station of copyrighted musical compositions owned and controlled by Society or its members. The defendants refused to agree to royalty payments based on actual use made of their musical compositions. Other proposals submitted by the broadcasting stations were also rejected by defendants. Each broadcasting station, in order to use the copyrighted musical compositions controlled by defendant Society and to avoid a multiplicity of infringement suits, acceded to the demands of defendant Society and accepted from defendant Society a three-year blanket license agreement. commencing on or about September; 1932, covering all musical compositions of all members of defendant Society. upon the basis of a royalty payment approximately equal to the fixed annual royalty paid for the preceding year, plus three percent of the station's net receipts during the first year of the agreement, four percent of such receipts during the second year, and five percent of such receipts during the third year. "Net receipts" as defined in said agreement, constituted the full amount paid to the station [fol. 19] for the use of its broadcasting facilities, after deducting commissions not exceeding fifteen percent, if any, paid to an independent advertising agent or agency.

To refuse to alter or change the terms of the contracts 'executed by and between the Society and radio broadcasting stations in 1932, which expired December 31, 1935; and to issue an ultimatum on or about January 10, 1936, in writing, to the various radio broadcasting stations to the effect that the performance of copyrighted musical compositions in the Society's repertoire of music would constitute a copyright infringement unless the existing contracts were renewed by January 15, 1936. The radio broadcasters located throughout the United States had no alternative but. to accept the terms dictated by the Society, since they could not operate without being subjected to the \$250 minimum damage provision for each copyright infringement of the copyright laws by performing music owned or controlled by the Society and its members. Within the specified time they accepted renewals of the contracts executed in 1932. These contracts executed in 1932, expired on December 31, 1940.

- F. To refuse to renew the licenses to radio broadcasters which expired December 31, 1940, under threat of withdrawing from the interstate commerce of radio broadcasting and public enjoyment the vast pool of copyrighted music acquired by the Society, by means of the illegal conspiracy alleged herein and under the further threat of inflicting the \$250 minimum damage provision of the copyright laws. unless the radio broadcasters accepted the licenses tendered to them by Society. The percentage of income demanded by members of defendant Society from radio broadcasting stations since 1932, represents a percentage of the entire [fol. 20] income received by such broadcasting stations for the sale to advertisers of their operating time on the air. Such demand for the payment of these percentages constitutes a charge upon income received by radio broadcasting stations for their time devoted to the broadcasting of lectures, dramatizations, sporting events, and other programs, which employ none of the copyrighted musical compositions of the members of defendant Society.
- G. To withdraw on January 1, 1941, from approximately 568 radio broadcasting stations interspersed throughout the United States, including the three national network systems, National Broadcasting Company, Columbia Broadcasting System and Mutual Broadcasting System, who had not accepted a license at the price and terms fixed by the defendants, the right to broadcast in interstate commerce and to deprive the radio listening public of the privilege of hearing and enjoying all the copyrighted music of all the respective members of the Society.
- H. To create and maintain, prior to December 31, 1940, a distinction and discrimination between the license agreements exacted of radio broadcasting stations owned at least 51 percent by newspapers and license agreements exacted from radio broadcasting stations not so owned. The license agreement offered by defendant Society to broadcasting stations owned 51 percent by newspapers, and accepted by many, did not require payment to defendant Society of a percentage of the station's income derived from all advertisers, but only required the payment of 3 percent of the income, of the station received from

advertisers whose programs included musical compositions owned or controlled by members of defendant Society. This 3 percent was payable until the total amount paid by the [fol. 21] station equalled an amount agreed upon between the station and defendant Society. Thereafter, the station was required to pay 5 percent of all additional income received by it from programs in which musical compositions owned or controlled by members of defendant Society were used.

- I. To insert provisions or terms in all the license agreements to users of music which permit the copyright owner, through defendant Society, to withdraw at will from the operation of the license any musical compositions owned or controlled by such copyright owner and thereby prevent its broadcast by the broadcasting station, thereby enabling members of defendant Society to withdraw musical compositions in the Society's repertoire in great demand by the general public, for the purpose of collecting additional compensation for the right to perform publicly for profit and for the further purpose of collecting enhanced and noncompetitive fees for the right to record and reproduce mechanically copyrighted musical compositions reproduced for public performance for profit; and to force radio broadcasting stations to accept all terms and conditions imposed by members of defendant Society for the right to broadcast popular musical compositions which have been withdrawn from the Society's general ligenses.
- J. To require radio broadcasting stations to accept a blacket license as heretofore stated upon terms and conditions imposed by defendant Society, thereby securing for members of the Society the exclusive use of radio broadcasting as a means of conveying musical compositions to the ear of the public-at-large, destroying the economic incentive of broadcasting stations to use the musical compositions of composers, authors and publishers who are not [fol. 22] members of defendant Society and thereby preventing non-members of defendant Society from receiving the compensation for the rights of public performance of their musical compositions, which they would otherwise receive, and limiting and restricting the popular demand

of the listening public to musical compositions controlled by defendant Society.

- K. To require acceptance of their arbitrary and noncompetitive demands for royalties by all classes of music users, as a condition precedent to the acquisition by such music users of the right to perform any copyrighted musical compositions of any members of the Society publicly for profit. The motion picture exhibitors interspersed throughout the United States must perform those musical compositions synchronized with the motion picture films in order to exhibit the motion picture films. Without the right to exhibit and perform the musical compositions synchronized therewith, the motion picture films received in interstate commerce are valueless. All users of music must perform those musical compositions demanded by their audiences. The limitation and restriction of popular demand to the musical compositions controlled by defendant Society has forced such users of music to obtain from defendant Society a license to perform music controlled by defendant Society so demanded by the public. The members of defendant Society, through defendant Society, have concertedly refused to grant such users permission to perform individual musical compositions selected by the users, but have insisted and still insist that general licenses be accepted which cover all the musical compositions of all the members of defendant Society, upon payment of a fixed amount therefor, irrespective of whether one or more of such musical compositions are actually performed. By this method of [fol. 23] licensing the members of defendant Society have further restricted the popular demand to those musical compositions owned or controlled by the members of defendant Society, and, have prevented the use of musical compositions owned by non-members of defendant Society.
- L. To prevent the sale and transportation in interstate commerce of musical scores owned by composers, authors and publishers who are not members of defendant Society, by refusing to issue licenses for the public performance of musical compositions owned or controlled by them, except upon the terms and conditions above set forth.

M. To adopt and maintain a comprehensive system for the acquiring of detailed and complete information relative to the musical compositions used by broadcasting stations, by means of which information the members of defendant Society have been and are enabled to conduct their operations through defendant Society so as to prevent the development of competition between members of defendant Society and owners of copyrighted musical compositions who are not members of defendant Society, and to maintain and enforce all provisions of the licenses between Society and radio broadcasting stations.

VI

Purpose and Effect of the Conspiracy

16. That the defendants have adopted the means and engaged in the activities aforesaid, with the intent, purpose, and effect of unreasonably and unlawfully maintaining enhanced and uniform prices in the interstate commerce in copyrighted musical compositions controlled by Society, and have otherwise restrained unreasonably the interstate [fol. 24] commerce of radio broadcasting, sheet music, motion picture, films, and electrical transcriptions; that all members of defendant Society, through the mutual and identical agreements hereinbefore described, have actively and effectively restrained their own activities, have eliminated competition among themselves, and have created. maintained and utilized defendant Society as an instrumentality unreasonably to restrain and restrict, directly and indirectly the interstate trade and commerce, as hereinbefore described

VII

Jurisdiction and Venue

17. That the combination and conspiracy herein set forth has operated and has been carried out in part within the Southern District of New York, and many of the unlawful acts pursuant thereto have been performed by defendants and their representatives in said District; that the interstate trade and commerce in radio broadcasting, sheet music,

motion picture films and electrical transcriptions as herein described, is carried on in part within said District; that said defendants have usual places of business in the said District and therein transact business and are within the jurisdiction of the Court.

18. That this Complaint is filed and the jurisdiction of this Court is invoked against defendants American Society of Composers, Authors and Püblishers, its officers and directors, and the members thereof, because of their violations, jointly and severally, as herein alleged, of Section 1 of the Sherman Act, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies."

[fol. 25]

VIII

Prayer

Wherefore, Complainant Prays:

- 19. That a writ of subpoena issue, directed to defendants named herein, demanding said defendants to appear herein and answer the allegations contained in this Complaint; that the combinations, conspiracies, agreements, and activities of defendants described in this Complaint be declared to constitute a conspiracy in restraint of interstate and foreign trade and commerce, and to be illegal and in violation of the Act of Congress approved July 2, 1890, known as the Sherman Antitrust Act; that the defendant Society and each and all of its respective officers, managers, agents, employees, members, and all persons acting or claiming to act on behalf of defendants be enjoined and restrained from entering into any contract, agreement, conspiracy, or otherwise do the following acts and things:
- (1) From acquiring or asserting any exclusive performing right as agent, trustee or otherwise on behalf of any copyright owner or other owner of the performing right, with respect to any copyrighted musical composition not owned by Society.
- (2) From exercising any right or power to restrict musical compositions in the defendant Society's catalogue of

music from public performance for profit by licensees of defendant for the purpose of regulating or fixing the price of recordation fees with respect to said musical compositions.

- (3) From refusing to issue public performance for profit licenses authorizing the performance of specified musical. [fol. 26] compositions owned or controlled by defendant Society.
- (4) From refusing to issuedicenses authorizing the public performance for profit of copyrighted musical compositions in defendants' catalogue of music upon terms and conditions which do not require the payment of a percentage of the gross receipts derived from radio programs on which no copyrighted musical compositions owned or controlled by the defendant, Society, are performed.
- (5) From issuing licenses authorizing the public performance for profit of any musical composition or compositions other than on a basis whereby, insofar as network radio broadcasting is concerned, the issuance of a single license authorizing and fixing a single license fee for such performance by network radio broadcasting shall permit the simultaneous broadcasting of such performance by all stations on the network which shall broadcast such performance, without requiring separate licenses for such several stations for such performance.
- (6) From refusing to license the public performance for profit by designated radio broadcasting stations, of any musical composition in defendant Society's catalogue of musical compositions licensed for radio broadcasting which is or shall be lawfully recorded on an electrical transcription or other recordation intended for broadcasting purposes, by a single license to any manufacturer, producer or distributor of such transcription or recordation or to any advertiser or advertising agency on whose behalf such transcription or recordation shall have been made who may request such license which single license shall authorize the broadcasting of the recorded composition or compositions by means of such transcription or recordation by all radio

stations enumerated by the licensee, without requiring sepa-[fol. 27] rate licenses for such enumerated stations.

- (7) From entering into any licensing agreement with any user of music which discriminates in price or terms between different users similarly situated.
- (8) From electing the members of the Board of Directors of the Society in any manner other than by a membership vote in which all author, composer and publisher members shall have the right to vote for their respective representatives to serve on the Board of Directors.
- (9) From distributing to its members the moneys received by granting the right to perform copyrighted musical compositions publicly for profit on any basis other than the number, nature, character and prestige of the copyrighted musical compositions composed, written or published by each member, the length of time in which the works of the member have been a part of the catalogue of the Society, and popularity and vogue of such works, all to be determined in a fair and non-discriminatory manner.
- (10) From requiring, as a condition precedent to eligibility for author or composer membership in the Society the regular publication of more than one musical composition or writing by any person who regularly practices the profession of writing music and the text or lyrics of musical works.
- 20. That plaintiff have such other and further relief as to the Court may seem proper and that plaintiff recover its costs.

Dated: February 26, 1941.

Victor O. Waters, Special Assistant to the Attorney General. Warren Cunningham, Jr., Special Attorney.

Thurman Arnold, Assistant Attorney General. Matthis F. Correa, United States Attorney.

[fol. 39]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

Term, 1941

Civil Action File No. 13-95

United States of America, Plaintiff,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS: GENE BUCK, PRESIDENT: GEORGE W. MEYER, SECRETARY: and GUSTAVE SCHIRMER, TREASURER, Defendants.

CIVIL DECREE AND JUDGMENT-March 4, 1941

This cause came on to be heard on this 3rd day of March, 1941, the plaintiff being represented by Thurman Arnold, Assistant Attorney General, Victor O. Waters, Special Assistant to the Attorney General, and Warren Cunningham, Jr., Special Attorney, and the defendants being represented by their counsel, and having appeared and filed their answer to the complaint herein.

It appears to the Court that defendants herein have consented in writing to the making and entering of this decree, without any findings of fact, upon condition that neither such consent nor this decree shall be construed as an admission or adjudication that said defendants have violated any law.

[fol. 40] It further appears to the Court that this decree will provide suitable relief concerning the matters alleged in the complaint filed herein and that by reason of the aforesaid consent of defendants and its acceptance by plaintiff it is unnecessary to proceed with the trial of the action, or to take testimony therein, or that any adjudication be made of the facts.

Now, Therefore, Upon motion of plaintiff, and in accordance with said consent, it is hereby

Ordered, Adjudged and Decreed

- I. The Court has jurisdiction of the subject-matter set forth in the complaint and of the parties hereto with full power and authority to enter this decree and the complaint states a cause of action against the defendants under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" and the acts amendatory thereof and supplemental thereto.
- II. Defendants, Gene Buck, as President of the American Society of Composers, Authors and Publishers; George W. Meyer, Secretary; Gustave Schirmer, Treasurer; and American Society of Composers, Authors, and Publishers, its officers, directors, agents, servants, employees, members, and all persons acting or claiming to act on its behalf are hereby perpetually enjoined and restrained from entering into or carrying out, directly or indirectly, any combination or conspiracy to restrain interstate trade and commerce, as alleged in the complaint, by doing, performing, agreeing upon, entering upon or carrying out any of the [fol. 41] acts or things hereinafter in this paragraph II prohibited.
- (1) Defendant, American Society of Composers, Authors and Publishers, shall not, with respect to any musical composition, acquire or assert any exclusive performing right as agent, trustee or otherwise on behalf of any copyright owner, its members, or other owner of the performing right, or pursuant to any understanding or agreement with such owner, or its members, to pay for such right a share of, or an amount measured by, the receipts or revenues of said defendants. Nothing herein contained shall be construed as preventing defendant, American Society of Composers. Authors and Publishers, from regulating the activities of its members in the following respects: (a) By requiring all moneys derived from the issuance of licenses by the respective members of defendant to be paid by the licensee to defendant and distributed in the same manner as other revenues; (b) by requiring of its members that notice be given the defendant of their intent to issue licenses before the issuance of same; (c) by prohibiting the members from

issuing exclusive licenses to commercial users of music; (d) by requiring, as a condition precedent to the issuance of a license by an individual member of the Society, the approval and consent, to be obtained by the licensor, of the composer (s), author (s) and publisher subject to such reasonable regulations as may be adopted by the composer (s), author (s) and publisher for that purpose; (e) by prohibiting the members from granting or assigning to persons, firms, corporations or enterprises, including Broadcast Music, Inc., the right to license or assign to others the right to perform publicly for profit the respective copyrighted musical compositions of which performance rights are owned or controlled by the respective members of the defendant Society.

- [fol. 42] (2) Defendant, American Society of Composers, Authors and Publishers, shall not enter into, recognize as valid or perform any performing license agreement which shall result in discriminating in price or terms between licensees similarly situated; provided, however, that differentials based upon applicable business factors which justify different prices or terms shall not be considered discriminations within the meaning of this sub-paragraph; and provided further that nothing contained in this sub-paragraph shall prevent price changes from time to time by reason of changing conditions affecting the market for or marketability of performing rights:
- (3) Defendant, American Society of Composers, Authors and Publishers, shall not require, as a condition to any offer to license the public performance for profit of a musical composition or compositions for radio broadcasting, a license fee of which any part shall be (a) in respect of commercial programs, based upon a percentage of the income received by the broadcaster from programs in which no musical composition or compositions licensed by said defendant for performance shall be performed, or (b) in respect of sustaining programs, an amount which does not vary in proportion either to actual performances, during the term of the license, of the musical compositions licensed by said defendant for performance, or to the number of programs on which such compositions or any of them shall be

performed; provided, however, that nothing herein contained shall prevent said defendant from licensing a radio broadcaster, on either or both of the foregoing basis, if desired by such broadcaster, or upon any other basis desired by such broadcaster.

[fol. 43] With respect to any existing or future performing license agreement with a radio broadcaster, defendant, American Society of Composers, Authors and Publishers, shall not, if required by such broadcaster, refuse to offer a per program basis of compensation on either or both of the following basis which may be specified by the broadcaster:

- (i) in respect of sustaining programs a per program license fee, expressed in terms of dollars, requiring the payment of a stipulated amount for each program in which musical compositions licensed by said defendant shall be performed;
- (ii) in respect of commercial programs, a per program license fee, either expressed in terms of dollars, requiring the payment of a stipulated amount for each program in which the musical compositions licensed by said defendant for performance shall be performed, or, at the option of defendant, the payment of a percentage of the revenue derived by the licensee for the use of its broadcasting facilities in connection with such program.

In the event that defendant shall offer to license the public performance for profit of a musical composition or compositions for radio broadcasting upon either or both of the foregoing per program basis, and shall also offer to license such performance on a basis of compensation which shall not vary in direct proportion either to actual performances dur-[fol. 44] ing the term of the licenses of the musical compositions licensed by said defendant for performance or to the number of programs on which musical compositions licensed by defendant shall be performed, defendant shall act in good faith so that there shall be a relationship between such per program basis and such other basis, justifiable by applicable business factors, including availability, so that there will be no frustration of the purpose of this sub-

paragraph to afford radio broadcasters alternative basis of license compensation.

- (4) Defendant, American Society of Composers, Authors and Publishers, shall not license the public performance for profit of any musical composition or compositions except on a basis whereby, in so far as network radio broadcasting is concerned, the issuance of a single license, authorizing and fixing a single license fee for such performance by network radio broadcasting, shall permit the simultaneous broadcasting of such performance by all stations on the network which shall broadcast such performance, without requiring separate licenses for such several stations for such performance.
- (5) With respect to any musical composition in defendant's catalogue of musical compositions licensed for radio broadcasting and which is or shall be lawfully recorded for performance on specified commercially sponsored programs on an electrical transcription or on other specially prepared recordation intended for broadcasting purposes, said defendant shall not refuse to offer to license the public performance for profit by designated radio broadcasting [fol. 45] stations of such compositions by a single license to any manufacturer, producer or distributor of such transcription or recordation or to any advertiser or advertising agency on whose behalf such transcription or recordation shall have been made who may request such license, which single license shall authorize the broadcasting of the recorded composition by means of such transcription or recordation by all radio stations enumerated by the licensee, on terms and conditions fixed by said defendant, without requiring separate licenses for such enumerated stations.
- (6) Defendant, American Society of Composers, Authors and Publishers, shall not, in connection with any offer to license by it the public performance for profit of musical compositions by users other than broadcasters, refuse to offer a license at a price or prices to be fixed by said defendant for the performance of such specific (i.e., per piece) musical compositions, the use of which shall be requested by the prospective licensee.

- (7) Defendant, American Society of Composers, Authors and Publishers, shall not, in connection with any offer to license by it the public performance for profit of musical compositions by radio broadcasters, refuse to offer a license on a per performance or per program basis as provided for in paragraph II (3) hereof at a price or prices to be fixed by said defendant for the performance of such programs, the use of which shall be requested by the prospective licensee.
 - (8) Defendant, American Society of Composers, Authors and Publishers, shall not assert or exercise any right or power nor shall any of its members exercise any right or power to restrict from public performance for profit by any licensee of said defendant any copyrighted musical com-[fol. 46] position in order to exact additional consideration for the performance thereof, or for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition; provided, however, that nothing in this sub-paragraph shall prevent said defendant or its members from restricting performances of a musical composition in order reasonably to protect the work against indiscriminate performances or the value of the public performance for profit rights therein or to protect the dramatic performing rights therein, or, as may be reasonably necessary in connection with any claim or litigation. involving the performing rights in any such composition.
 - (9) The Society shall not elect the members of the Board of Directors in any manner other than by a membership vote in which all author, composer and publisher members shall have the right to vote for their respective representatives to serve on the Board of Directors. Due weight may be given to the classification of the member within the Society in determining the number of votes each member may cast for the election of directors. Upon the expiration of the terms of office of the present directors, the provisions of this section shall apply to the election of their successors. Thereafter, not less than one-twelfth of the total membership of the Board of Directors shall be elected annually.

- (10) Defendant, American Society of Composers, Authors and Publishers, shall provide in its by-laws that the Society shall not distribute to its members the moneys received by granting the right to perform copyrighted musical compositions publicly for profit on any basis other than the number, nature, character and prestige of the copyrighted musical compositions composed, written or published by each member, the length of time in which the works of the member have been a part of the catalog of the Society, and [fol. 47] popularity and vogue of such works, all to be determined in a fair and nondiscriminatory manner.
- (11) Defendant, American Society of Composers, Authors and Publishers, shall not require as a condition precedent to eligibility for author or composer membership in the Society the regular publication of more than one musical composition or writing by any person who regularly practices the profession of writing music and the text or lyrics of musical works,
- III. The terms of this decree shall be binding upon, and shall extend to each and every one of the successors in interest of defendant, American Society of Composers, Authors and Publishers, and to any and all corporations, partnerships, associations and individuals who or which may acquire the ownership or control, directly or indirectly, of all or substantially all of the property, business and assets of defendant, American Society of Composers, Authors and Publishers, whether by purchase, merger, consolidation, re-organization or otherwise. None of the restraints of requirements herein imposed upon the defendant shall apply to the acquisition of or licensing of the right to perform musical compositions publicly for profit outside the United States of America, its territories and possessions.
- IV. For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on the written request of the Attorney General or an Assistant Attorney General and on reasonable notice to defendant, American Society of Composers, Authors and Publishers, made to the [fol. 48] principal office of said defendant, be permitted (a)

reasonable access, during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this decree; (b) subject to the reasonable convenience of said defendant and without restraint or interference from it, and subject to any legally recognized privilege, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters; and said defendant, on such request, shall submit such reports in respect of any such matters as may from time to time be reasonably necessary for the proper enforcement of this decree; provided, however, that information obtained by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings in which the United States is a party or as otherwise required by law.

V. This decree shall become effective ninety (90) days after the entry hereof, except that the provisions of subparagraph (6) of paragraph H shall become effective nine (9) months after the effective date of the other provisions of this decree,

VI. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to make application to the Court any time after the effective date hereof for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this decree, for the modification hereof [fol. 49] upon any ground for the enforcement of compliance herewith and the punishment of violations hereof. Jurisdiction of this cause is retained for the purpose of granting or denying such applications so made as justice may require and the right of the defendant to make such application and to obtain such relief is expressly granted.

-Approved-

fienry W. Goddard, United States District Judge.

We hereby consent to the entry of the foregoing decree.

For the complainant:

Thurman Arnold, Assistant Attorney General; Victor O. Waters, Special Assistant to the Attorney General; Warren Cunningham, Jr., Special Attorney.

For the Defendants:

Charles Poletti, Milton Diamond; Schwartz & Frohlich, by Herman Finkelstein, Member of the Firm.

Judgment rendered March 4, 1941. George J. H. Follmer, Clerk.

W.D.

[fol. 50]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 13-95

UNITED STATES OF AMERICA, Plaintiff.

-v-

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL., Defendants.

AMENDED FINAL JUDGMENT-Entered March 14, 1950

Plaintiff having filed its complaint herein on February 26, 1941, the defendants having appeared and filed their answer to the complaint denying the substantive allegations thereof, all parties having consented, without trial or adjudication of any issue of fact or law therein, to the entry of a Civil Decree and Judgment, filed March 4, 1941, and jurisdiction having been retained in this Court pursuant to Section VI of said Civil Decree and Judgment for the purpose of granting such modifications of the Civil Decree and Judgment as may be necessary and appropriate; and

Plaintiff having moved the Court that said Civil Decree and Judgment should be modified in certain respects, and all parties hereto consenting to such modifications and the entry of this Amended Final Judgment,

Now, Therefore, no testimony having been taken and without trial or adjudication of any issue of fact or law herein and without admission by any defendant in respect of any such issue and upon consent of all parties hereto, it is hereby

[fol. 51] Order d, Adjudged and Decreed that the Civil Decree and Judgment of March 4, 1941 be amended to read as follows:

T

This Court has jurisdiction of the subject matter hereof and of all parties hereto with full power to enter this Judgment. The complaint states a cause deaction against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Act, as amended.

П

As used in this Judgment:

- (A) "ASCAP" means the defendant American Society of Composers, Authors and Publishers;
- (B) "Right of public performance" means the right to perform a copyrighted musical composition publicly for profit in a non-dramatic manner, sometimes referred to as "small performing right";
- (C) "Motion picture performance right" means the right of public performance of music which is recorded in order to be performed in synchronism or timed relation to the exhibition of motion pictures;
- (D) "ASCAP repertory" means those compositions the right of public performance of which ASCAP has or hereafter shall have the right to license or sublicense;

[fol. 52] (E) "User" means any person, firm or corporation who or which (1) owns or operates an establishment or enterprise where copyrighted musical compositions are performed publicly for profit, or (2) is otherwise directly engaged in giving public performance of copyrighted musical compositions for profit, or (3) is entitled to obtain a license from ASCAP under Section V of this Judgment.

Ш

The provisions of this Judgment applicable to the defendant ASCAP shall apply to such defendant, its successors and assigns, and to each of their officers, directors, agents, employees, and to all other persons, including members, acting or claiming to act under, through or for such defendant. None of the injunctions or requirements herein imposed upon the defendants shall apply to the acquisition of or licensing of the right to perform musical compositions publicly for profit outside the United States of America, its territories or possessions, such acquisition or licensing being subject to the provisions of the Final Judgment entered this day in Civil Action No. 42-245.

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Defendant ASCAP is bereby enjoined and restrained from:

- (A) Holding, acquiring, licensing, enforcing, or nego-[fol. 53] tiating concerning any rights in copyrighted musical compositions other than rights of public performance on a non-exclusive basis;
- (B) Limiting, restricting, or interfering with the right of any member to issue to a user non-exclusive licenses for rights of public performance;
- (C) Entering into, recognizing, enforcing or claiming any rights under any license for rights of public performance which discriminates in license fees or other terms and conditions between licensees similarly situated;
- (D) Hereafter granting any license for rights of public performance in excess of he years' duration, except for

motion picture performance rights which are licensed pursuant to Section V(C) of this Judgment;

- (E) Granting to, enforcing against, collecting any monies from, or negotiating with any motion picture theatre exhibitor concerning any motion picture performance rights;
- (F) Instituting or threatening to institute, or maintaining or continuing any suit or proceeding (1) against any motion picture theatre exhibitor for copyright infringement relating to motion picture performance rights or (2) against any user for copyright infringement of any musical composition not contained in the ASCAP repertory. After the preparation of the list required to be maintained by Section XIV herein, the repertory shall be deemed to consist of only those compositions appearing on such list;
- [fol. 54] from membership in ASCAP at the end of any fiscal year upon (1) giving three months' advance written notice to ASCAP, and (2) agreeing that his resignation shall be subject to any rights or obligations existing between ASCAP and its licensees under then existing licenses and to the rights of the withdrawing member accruing under such licenses;
- (H) Asserting or exercising any right or power to restrict from public performance for profit by any licensee of ASCAP any composition in order to exact additional consideration for the performance thereof, or for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition. Nothing in this Subsection shall be construed to prevent ASCAP, when so directed by the member in interest in respect of a musical composition, from restricting performances of a composition in order reasonably to protect the composition against indiscriminate performances, or the value of the public performance for profit rights therein, or the dramatic performing rights therein, or to prevent ASCAP from restricting performances of a composition so far as may be reasonably necessary in connection with any claim or litigation involving the performing rights in any such composition.

Defendant ASCAP is hereby ordered and directed to issue, upon request, licenses for rights of public performance of compositions in the ASCAP repertory as follows:

- [fol. 55] (A) To a radio broadcasting network, telecasting network or wired music service (as illustrated by the organization known as "Muzak"), on terms which authorize the simultaneous and so-called "delayed" performance by broadcasting or telecasting, or simultaneous performance by wired music service, as the case may be, of the ASCAP repertory by any, some or all of the stations in the United States affiliated with such radio network or television network or by all subscriber outlets in the United States affiliated with any wired music service and do not require a separate license for each station or subscriber for such performances;
- (B) To a manufacturer, producer or distributor of a transcription or recordation of a composition in ASCAP's repertory which is or shall be recorded for performance on specified commercially sponsored radio programs or television programs, as the case may be, on an electrical transcription or on other specially prepared recordation intended for radio broadcasting or for television broadcasting purposes (or to any advertiser or advertising agency on whose behalf such transcription or recordation shall have been made) of the right to authorize the broadcasting, by radio or by television, as the case may be, of the recorded composition by means of such transcription or recordation by all radio stations or television stations in the United States enumerated by the licensee, without requiring separate licenses for such enumerated stations for such performance:
- [fol. 56] (C) To any person engaged in producing motion pictures (herein referred to as a "motion picture producer"), so long as ASCAP shall not have divested itself of such rights, a single license of motion picture performance rights covering the United States, its territories and possessions, without requiring further licenses. Such single license shall be issued in accordance with the following

requirements and in accordance with all other provisions of this Judgment not inconsistent therewith:

- (1) Such license shall be limited to pictures produced or in production not later than one year after the effective date of the license, and shall not make any charge for any performance occurring prior to the date of this Judgment;
- (2) Upon written request of any motion picture producer such licenses shall be issued on a "per film" basis for the compositions in such film which are in the ASCAP repertory;
- (3) All licenses of motion picture performance rights under this Subsection (C) shall be negotiated with and issued to individual motion picture producers, and not on an "industry-wide" basis;
- (4) Where within a period of nineteen (19) months prior to the entry of this Judgment a motion picture producer has obtained a license for motion picture performance rights directly from members of ASCAP and has paid a separately stated amount therefor, such licenses issued by ASCAP covering motion picture performance rights shall, at the request of such pro[fol. 57] ducer, include the rights conveyed by the previous license, in which event ASCAP shall allow the motion picture producer a credit against the amount otherwise payable, equal to the amount paid under the previous license;
- (5) No writer or publisher member of the Board of Directors of ASCAP shall participate in or vote on any question relating to the negotiation, execution, performance or enforcement of any such license where such member at the time, directly or indirectly, has any pecuniary interest in any motion picture producer, in any subsidiary or affiliate of any motion picture producer, or in any contractual relationship with any such producer.

Defendant ASCAP is hereby ordered and directed to grant to any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory. Defendant ASCAP shall not grant to any user a license to perform one or more specified compositions in the ASCAP repertory, unless both the user and member or members in interest shall have requested ASCAP in writing so to do, or unless ASCAP, at the written request of the prospective user shall have sent a written notice of the prospective user's request for a license to each such member at his last known address, and such member shall have failed to reply within thirty (30) days thereafter.

[fol. 58] VII

Defendant ASCAP, in licensing rights for public performance for radio broadcasting and telecasting, is hereby:

- (A) Enjoined and restrained from issuing any license, the fee for which
 - (1) in the case of commercial programs, is based upon a percentage of the income received by the licensee from programs which include no compositions in the ASCAP repertory, or
 - (2) in the case of sustaining programs, does not vary in proportion either (a) to the performance of compositions in the ASCAP repertory during the term of the license, or (b) to the number of programs on which such compositions or any of them are performed,

unless the radio broadcaster or telecaster to whom such license shall be issued shall desire a license on either or both of such bases:

- (B) Ordered and directed to issue to any unlicensed radio or television broadcaster, upon written request, per program licenses, the fee for which
 - (1) in the case of commercial programs, is, at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount

for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the sum paid by the sponsor [fol. 59] of such program for the use of the broadcasting or telecasting facilities of such radio or television broadcaster,

- (2) in the case of sustaining programs, is at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP reperfory shall be performed, or (b) based upon the payment of a percentage of the card rate which would have been applicable for the use of its broadcasting facilities in connection with such program if it had been commercial, and
- (3) subject to the other provisions of Section VIII, takes into consideration the economic requirements and situation of those stations having relatively few commercial announcements and a relatively greater percentage of sustaining programs, with the objective that such stations shall have a genuine economic choice between per program and blanket licenses;
- (C) Enjoined and restrained from requiring or influencing the prospective licensee to negotiate for a blanket license prior to negotiating for a per program license.

VIII

Defendant ASCAP, in fixing its fees for the licensing of compositions in the ASCAP repertory, is hereby ordered and directed to use its best efforts to avoid any discrimina-[fol. 60] tion among the respective fees fixed for the various types of licenses which would deprive the licensees or prospective licensees of a genuine choice from among such various types of licenses.

IX.

(A) Defendant/ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP

repertory, any ise the applicant in writing of the fee which it deems reasonable for the license requested. It the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when such application is received by ASCAP, the applicant therefor may forthwith apply to this Court for the determination of a reasonable fee and ASCAP shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding the burden of proof shall be on ASCAP to establish the reasonableness of the fee requested by it. Pending the completion of any such negotiations or proceedings, the applicant shall have the right to use any, some or all of the compositions in the ASCAP repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Subsection (B) hereof, and to the final order or judgment entered by this Court in such proceeding:

- (B) When an applicant has the right to perform any [fol. 61] compositions in the ASCAP repertory pending the completion of any negotiations or proceedings provided for in Subsection (A) hereof, either the applicant or ASCAP may apply to this Court to fix an interim fee pending final determination of what constitutes a reasonable fee. If the Court fixes such interim fee, ASCAP shall then issue and the applicant shall accept a license providing for the payment of a fee at such interim rate from the date of the filing of such application for an interim fee. If the applicant fails to accept such license or fails to pay the interim fee in accordance therewith, such failure shall be ground for the dismissal of his application. Where an interim license has been issued pursuant to this Subsection (B), the reasonable fee finally determined by this Court shall be retroactive to the date the applicant acquired the right to use any, some or all of the compositions in the ASCAP repertory pursuant to the provisions of this Section IX:
- (C) When a reasonable fee has been finally determined by this Court, defendant ASCAP shall be required to offer a license at a comparable fee to all other applicants similarly situated who shall thereafter request a license of

ASCAP, but any license agreement which has been executed without any Court intervention between ASCAP and another user similarly situated prior to such determination by the Court shall not be deemed to be in any way affected or altered by such determination for the term of such license agreement;

(D) Nothing in this Section IX shall prevent any ap-[fol. 62] plicant or licensee from attacking in the aforesaid proceedings or in any other controversy the validity of the copyright of any of the compositions in the ASCAP repertory nor shall this Judgment be construed as importing any validity or value to any of such copyrights.

X

No officer or director of ASCAP, or any person acting on its behalf, shall participate in or vote on any question relating to any transaction or negotiation involving ASCAP and a licensee, or prospective licensee, where such officer, director, or other person has any pecuniary interest in such licensee or prospective licensee, or in any subsidiary or affiliate thereof, or in any contractual relationship with any such licensee or prospective licensee.

XI

Defendant ASCAP is hereby ordered and directed to distribute to its manbers the monies received by licensing rights of public performance on a basis which gives primary consideration to the performance of the compositions of the members as indicated by objective surveys of performances (excluding those licensed by the member directly) periodically made by or for ASCAP.

[fol. 63] XII

Defendant ASCAP is hereby ordered and directed, with in three months after the entry of this Judgment, to provide in its Articles of Association, effective as of the date of this Judgment, that ASCAP's members be prohibited from:

(A) At any time, while a member of ASCAP or thereafter, instituting, or threatening to institute, or maintain-

ing or continuing any suit or proceeding for acts of copyright infringement relating to motion picture performance rights (1) alleged to have occurred prior to the date of this Judgment, or (2) where corresponding synchronization rights have been granted prior to the date of this Judgment;

(B) While a member of ASCAP, granting a synchronization or recording right for any musical composition to any motion picture producer unless the member or members in interest or ASCAP grants corresponding motion picture performance rights in conformity with the provisions of this Judgment.

XIII

In order to insure a democratic administration of the affairs of defendant ASCAP, and to assure its members an opportunity to protect their rights through fair and impartial hearings based on adequate information, defendant fol. 64] ASCAP is hereby ordered and directed to provide in its Articles of Association:

- (A) That the members of the Board of Directors shall be elected by a membership vote in which all author, composer and publisher members shall have the right to vote for their respective representatives to serve on the Board of Directors. Due weight may be given to the classification of the member within ASCAP in determining the number of votes each member may cast for the election of directors. Elections for the entire membership of the Board of Directors shall take place annually or every two years. The Board of Directors shall, as far as practicable, give representation to writer members and publisher members with different participations in ASCAP's revenue distributions;
- (B) That the general basis of member classification for voting and revenue distribution purposes shall be set forth in writing and shall be made available to any member upon request;
- (C) That any member may appeal from the final determination of his classification by any ASCAP committee or board to an impartial arbiter or panel;

(D) That records be maintained by the officers, committees, or boards of ASCAP, and the impartial arbiters or panels referred to in Subsection (C) of this Section dealing with the classification of members and distribution of revenues, which will adequately apprise the respective members of the determinations made and actions taken by such officers, committees and boards of ASCAP, and arbifol. 65] ters or panels as to such members and the basis therefor.

XIV

Immediately following entry of this Judgment, defendant ASCAP shall upon written request from any prospective user inform such user whether any compositions specified in such request are in the ASCAP repertory, and make available for public inspection such information as to the ASCAP repertory as it has. Defendant ASCAP is furthermore ordered and directed to prepare within two years, and to maintain and keep current and make available for inspection during regular office hours, a list of all musical compositions in the ASCAP repertory, which list will show the title, date of copyright and the author, composer and current publisher of each composition.

xv

Defendant ASCAP is hereby ordered and directed to admit to membership, non-participating or otherwise,

- (A) Any composer or author of a copyrighted musical composition who shall have had at least one work of his composition or writing regularly published;
- (B) Any person, firm, corporation or partnership actively engaged in the music publishing business, whose [fol. 66] musical publications have been used or distributed on a commercial scale for at least one year, and who assumes the financial risk involved in the normal publication of musical works.

XVI

For the purpose of securing compliance with this Amended Final Judgment; duly authorized representatives

of the Department of Justice shall upon the written request of the Attorney General or an Assistant Attorney General, and on reasonable notice to defendant, be permitted (a) reasonable access, during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this Amended Final Judgment; (b) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters; and said defendant, on such request, shall submit such reports in respect of any such matters as may from time to time be reasonably pecessary for the proper enforcement of this Judgment, provided, however, that information received by the means permitted in this Section XVI shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings in which the [fol. 67] United States is a party or as otherwise required by law.

XVII

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to thi. Amended Final Judgment to make application to the Court for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this Judgment, for the modification thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

It is expressly understood, in addition to the foregoing; that the plaintiff may, upon reasonable notice, at any time after five (5) years from the date of entry of this Amended Final Judgment apply to this Court for the vacation of said Judgment, or its modification in any respect, including the dissolution of ASCAP (and any time within two (2) years from said date apply to this Court for the vacation or modification of Section V(C) hereof). During the applicable periods specified above, defendant ASCAP is here-

by ordered and directed to conduct its affairs, including the making of agreements to acquire or license the rights of public performance, so as not unreasonably to complicate or delay the enforcement of any such further relief requested by plaintiff and granted by this Court pursuant to the terms of this Section.

[fol. 68] XVIII

This Amended Final Judgment shall become effective from the date of entry hereof, except that the provisions of Sections IV (G), XIII and XV shall become effective three menths after the date of entry hereof, and the provisions of Section XI shall become effective eight months after the date of entry hereof. This Amended Final Judgment supersedes the Civil Decree and Judgment entered herein on March 4, 1941, but shall not be construed to make proper or lawful or sanction any acts which occurred prior to the date hereof which were enjoined, restrained or prohibited by said Civil Decree and Judgment of March 4, 1941.

Approved: March 14, 1950.

Henry W. Goddard, United States District Judge.

We hereby consent to the entry of the foregoing Judgment.

For the plaintiff

Sigmund Timberg, Special Assistant to the Attorney General; William D. Kilgore, Jr., Harry Lasser, Special Attorneys; Herbert A. Bergson, Assistant Attorney General; Melville C. Williams, Special Assistant to the Attorney General; Igving H. Saypol, United States Attorney.

For the defendants

Robert P. Patterson, Herman Finkelstein, Oscar Cox, Schwartz & Frehlich by Louis D. Frehlich.

Judgment entered:

William V Connell, Clerk.

O'G

March 14, 1950.

[fol. 69]

United States District Court Southern District of New York Civ. 13-95

UNITED STATES OF AMERICA, Plaintiff,

VS.

American Society of Composers, Authors and Publishers, et al., Defendants.

Before: Hon. Sylvester J. Ryan, District Judge.

Transcript of Proceedings of June 19, 1959

New York, 3.15 o'clock p. m.

APPEARANCES:

William D. Kilgore, Jr., Esq., and Alfred Karsted, Esq., Attorneys, Department of Justice, for the Plaintiff.

Arthur H. Dean, Eso., Poward T. Milman, Esq., Herman Finkelstein, Esq., and Ferdinand Perora, Esq., Attorneys for Defendants.

[fol. 70]

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Kilgore: Well, your Honor, this involves a matter arising out of the amended final judgment entered in United States vs. American Society of Composers, Authors and Publishers. My name is William D. Kilgore, Jr., and I am accompanied by Mr. Alfred Karsted, representing the Antitrust Division of the Department.

As part of our responsibilities under the amended judgment, in 1956 we started checking into compliance by ASCAP with the amended judgment. By 1958 we were prepared to file a motion requesting the Court to enter an order carrying out certain details of the amended judgment.

ASCAP requested and was given an opportunity to see if we couldn't negotiate the issues involved. The parties have now reached an agreement upon a proposed order which I submit to your Honor.

Well, first, I would like to give you a copy of the motion which the Department desires to file, the memorandum of the Department in support of that motion, and the order—

The Court: What is this, a motion made with the consent,

of the defendants?

Mr. Kilgore: No, sir. The motion is not made with the consent of the defendants. The terms of the order which [fol. 71] is proposed has been agreed to by the Government and ASCAP.

The Court: Will you date this notice of motion? Apparently it looks like a petition—

Mr. Kilgore: Yes, sir.

The Court: —rather than a notice of motion. It looks like a petition to me.

Am I correct in accepting this paper that you have now handed me as a petition filed on behalf of the Government?

Mr. Kilgore: Yes, sir, it is.

The Court: Rather than a notice of motion.

Mr. Kilgore: That's right, sir.

The Court: All right. And the petition prays for what relief?

Mr. Kilgore: The petition just has a general prayer, sir, and prays for entry of the order which is submitted at the same time.

The order is a printed document with two accompanying

printed documents.

The Court: The accompanying printed documents are one entitled Writers Distribution Formula, and the other Weighting Formula.

Mr. Kilgore: Yes.

[fol. 72] The Court: Have you extra copies of these documents that you can leave with me?

Mr. Kilgore: Yes, sir.

The Court: All right. Are the defendants here represented?

Mr. Dean: Yes, your Honor. My name is Arthur Dean. I represent the American Society of Authors and Composers, and they are also represented by Judge Pecora, Mr. Finkelstein and Mr. Milman.

The Court: Are you appearing here by arrangement

with the Government, without notice?

Mr. Dean: Yes, your Honor.

The Court: Have you extra copies of this order and of the paper that you want to submit to me?

Mr. Kilgore: Yes, sir.

The Court: Now, just what do you want the Court to do in connection with this proposed order, with the two schedules that you have just submitted?

Mr. Kilgore: I was looking for another copy of our

memorandum, sir.

The Court: Well, you have given me one. Here, apparently, is the other one.

Mr. Kilgore: Right, sir. This will give you two com-

plete sets, sir.

The Court: That is fine. Thank you.

[fol. 73] Mr. Kilgore: Your Honor, the proposed order relates to the activities of ASCAP which may be described generally as the internal operation of ASCAP. It relates to the method by which ASCAP determines what ASCAP music is played and what the names of the compositions are.

It deals also with the distribution system which makes up the rules under which the Society determines how much its publisher and writer members get for each of the per-

formances that are logged in the survey.

It also deals with the voting rights of the members.

Presently there is no limit to the number of votes which a member has, but is determined by the revenues which

the member earns from ASCAP.

The proposed order also deals with some other facets of ASCAP's operation, but because there are 1200, approximately 1200 publisher members of ASCAP and some 4000 writer and composer members of ASCAP, we are requesting the Court, because they are so vially affected in this, if the Court will permit us to have the motion and the proposed order spread on the record for a period of time, [fol. 74] approximately 30 days, and thereafter if any of

the members of ASCAP, who feel that they are adversely affected by the proposed order, would give their comments to the Court and to the parties in order that we may best determine the appropriateness of the proposed order, to that end we desire to submit to you today a proposed order which is procedural in nature, but which would require that ASCAP mail a copy of the proposed consent order to each of its members, together with a notice that the matter will come on for hearing before your Honor on a date certain.

The order would also require that ASCAP notify its members that they should submit their comments to the Court in writing and any member desiring to be heard orally regarding his comments shall submit his request to the Court by date certain.

I submit to the Court the proposed procedural order which has been consented to by ASCAP and the Government.

The Court: Well, very frankly, I am not going to mince words about this. I don't like the procedure that is being followed here, and I think it is presumptuous to submit this matter to me in this form.

[fol. 75] I think had this step been contemplated I should have been consulted about it. I do not think it is a proper way to proceed in this matter, and I do not think the burden should be placed upon the Court of sifting through these objections which may be filed, if any.

I think that if the Government and the defendant Society have agreed that certain amendments and changes in the final decree are desirable and are agreeable to both parties, that it should be brought on by a formal application and an order to show cause which would provide for due and sufficient publication, which would set a return date at which time anybody might be heard in open court.

I think that is the procedure that should be followed. I don't think that I should operate as a clearing house for objections to be filed with me other than on a return date.

Mr. Kilgore: Well, your Honor, we are following here, to some extent, the precedent that was followed—that I am familiar with—in the Paramount case and which—

The Court: I know. I am following my own precedent.

[fol. 76] Mr. Kilgore: Right, sir.

The Court: And a precedent that I think is founded upon my own experience, limited though it may be.

Mr. Kilgore: Right. We will handle it as your Honor

desires.

The Court: I think that is the way it should be handled, and I don't think the Court should operate as a clearing house for the filing of objections other than those that are filed on a given return date after due and appropriate notice.

Mr. Kilgore: Yes, sir.

The Court: I don't mean that by way of any personal criticism of counsel, but I do not propose in these antitrust suits, or in any other suit, to be used as a rubber stamp approval, and I think I have made my position quite plain

before, not in this case, but in other litigation.

Now I have this further observation to make. I think that in a matter of this type, involving; as it does, perhaps the rights and substantial rights of a large number of members, that there should be ample opportunity to advise them and to give them due notice; that we have no right [fol. 77] to proceed in any hurried fashion with any procedure which might operate to dilute their rights as they now exist or to foreclose them from subsequently asserting any claims or objections.

I think the procedure that you outlined might well be a denial of due process, and I think that if this is to be handled it should be handled on a formal order to show cause which will provide for a method of notification which will give these people ample time to come in and make a

formal protest if they desire to make it.

I don't see that you should hurry it in any period of 30 days.

Mr. Dean: Your Honor, we will, naturally, follow whatever procedure you recommend. What we had planned to do was to mail copies of the original decree, and this pro-

posed amendment to it, and all of their rights—
The Court: Mr. Dean, here is my position in a nutshell,

and I think you will appreciate it.

Mr. Dean: I understand, surely.

The Court: I think it would have been better if we had

sat down and discussed this matter in an informal fashion rather than come in and submit to me formal papers, expecting that I am going to approve them as a matter of form.

[fol. 78] Irrespective of my personal opinion as to the efficacy of the enforcement and carrying on of these continuing forms of injunctive relief which are granted in antitrust suits, and of the intolerable burden it places upon a busy court, it is the duty of this Court to carry it out, and I propose to do so.

However, I feel that there is a definite obligation placed upon the Court to act as an independent judicial body and not to function as an accessory to the Department

of Justice or to any other subdivision of it.

Mr. Dean: I appreciate that. What we planned to do— The Court: I don't say that by way of criticism—I again repeat—of anybody. This is not the way I am accustomed to act and to exercise my judicial functions.

Mr. Dean: Yes, sir. I might show you that what we planned to do was to mail this (indicating) some 30 days before whatever date you could hear us on it, and then we planned to have meetings, regional meetings in Los Angeles to explain it, and then a regional meeting in New York.

The Court: I am not going to be party to any propaganda [fol. 79] or any means of solicitation or urging.

Mr. Dean: No, sir.

The Court: I am not going to be used as an instrument of persuasion, and I think you can do what you desire with reference to meetings throughout the country; that is a matter for you and for the Department of Justice to determine. All that I will do will be to act upon a formal petition when it is presented to me; sign and execute an order to show cause, inviting all those who have an interest in this proceeding to appear on a date certain in court and make any objection, if they desire then, in open court, to the proposed amendment.

I don't think that 30 days is ample notice in view of the widespread interests which are here involved.

Mr. Dean: Could I ask you a question?

The Court: You may ask. We are talking here now, perhaps, more as lawyers than as a judge to lawyers:

. Mr. Dean Yes, sir. Ordinarily, of course, you have your stock corporation and your board of directors. Here we have an association of some-how many members are there altogether?

Mr. Kilgore: 5000.

Mr. Dean: About 5000 members. Would you think that-I was just inquiring, what do you think is the appropriate way to give them notice, publication in

newspapers?

The Court: I think if you are definite and certain as to who has a right to participate in the dividends, or whatever you would call them of ASCAP, and they are definitely identified, we might well avoid printed publication. But I think the notice should be such as would constitute due notice and meet all the requirements of due process as to notice, because here you are affecting, apparently-although I haven't read the proposed decree, nor have I, in any way, been advised about it, and I know nothing of what it contains-but apparently what you are doing here is to affect substantially-and I guess you are conscious of it, too, otherwise you wouldn't feel that notice should be given-you are affecting substantially the property rights of a large number of people.

Mr. Dean: That is correct, your Honor.

The Court: And you are affecting them, most likely, adversely.

Mr. Dean: Not necessarily. [fol. 81] Mr. Kilgore: No.

Mr. Dean: It might be, but not necessarily.

The Court: Well, if it wasn't adversely, there would

really be no need to give them any notice.

Mr. Dean: Well, the Department of Justice feels we are helping some of the members and that we are trying to carry out-

The Court: Well, you know, sometimes, whether or not you really are helping a man depends upon your point

of view.

Mr. Dean: That is right, your Honor.

The Court: And many times someone has told you that they are doing you a great favor and helping you, and

you have felt that a grave injustice is about to be perpetrated upon you and that you are about to be ravished.

Mr. Karsted: Your Honor, as a matter of procedure, would your Honor propose taking evidence on the return date?

The Court' I don't know. I don't know what this proceeding is. You gentlemen came in—I received a telephone call, somebody wanted to come up to see me about some matter connected with ASCAP, somebody from the Antitrust Division in Washington. This is the first inkling [fol. 82] I have had of any proposed modification of this decree. I knew nothing of what this proposal contained.

I haven't in any way been advised of it, and I am in complete ignorance and darkness concerning its contents, its purpose or its effect. Whether or not on the return day there should be testimony taken to assure me, as the judge, that public interest is being amply protected, I don't know yet, and I won't know until first I have had an opportunity to digest whatever papers are submitted to me, to consider them and to consider them in the light of any objections which are filed.

Mr. Kilgore: Well, your Honor, we had planned just to file the petition or order, the proposed order, and make sure that the membership of ASCAP knew what was going on, because we are concerned about it. But I can appreciate your viewpoint.

The Court: So that you get my position—I don't mean to be too pointed about it; I don't think you intended to be presumptuous.

Mr. Kilgore: I did not, your Honor.

The Court: I don't think you intended to treat the Court as being simply an instrument that could be wielded and [fol. 83] directed in compliance to what you felt should be the course taken by the Court. But that is the net result of what you have done.

Mr. Kilgore: Well, we had requested, sir, an informal discussion with you, to put this proposed procedure before you.

The Court: I think you had progressed beyond that stage. I think you came to me with a well formulated plan that you both had in mind, and that you felt, here, now, the Judge will sign this and away it will go.

I don't like to approad judicial matters from that point of view and with that method of procedure.

Mr. Dean: How long a time do you think we ought to

give notice, your Honor!

The Court; Well, I don't know how wide-scattered your so-called members are. By "your members" I take it you refer to those that have copyrights or who have an interest in copyrights, who are entitled to share in the collections of royalties which are made by the Society.

Mr. Dean: Yes, sir. They are both writers and publishers.

They are widely scattered all over the United States. .

The Court: Then I suppose some might even be residents [fol. 84] abroad. I don't know, I don't know. Some might live in Canada. I would say that there should be a minimum of 90 days, maybe 120 days notice.

Mr. Dean: We wanted to give the widest possible notice,

the widest possible circulation of it.

The Court: I think there should be. You see, I know nothing of what this proposal is. I know nothing of its purpose, and I know still less about what its effect will be.

Mr. Kilgore: Well, it is because we were concerned with the possible effect of it, and not being able to talk to the membership of ASCAP—and they are widespread; we have heard views of a number of the members of ASCAP, and we were trying to come up with just some way so that we could get this before them.

The Court: I don't know what their views are. I don't know the medium by which they have been expressed or conveyed to the Department of Justice or to ASCAP itself. If you have had hearings on this matter I should have a transcript of them. If you have had communications on this matter from various members I should have them. I should have all expressions of opinion that you have already had.

You are asking me to take judicial action with reference [fol. 85] to a consent decree which was entered, my recollection is, in the time of Judge Goddard, and a modified decree was entered, and the original decree was—

Mr. Pecora: 1941, and then modified 1950.

The Court: Almost 17, 18 years ago. Now I may have to take testimony in order to satisfy myself that this

modification is of public interest. I may have to take testimony concerning the present condition of the industry, and of the market.

Mr. Kilgore: Well, we had misjudged the Court's desires on it. We have been working on it for a little over a year and I guess maybe we are living a little bit too close to it, your Honor.

The Court I think that may be the answer. Sometimes you get too close to a problem, you don't appreciate just what is involved. I don't know what is involved myself.

Mr. Kilgore: Because we had not any desire that the

Court would just sign the order-

The Court: I don't question your sincerity of purpose or the sincerity of purpose of the defendants in any way, nor do I question your motives. I have to say that I am somewhat irritated by the procedure that you followed, [fol. 86] but I will try to remove that irritation, and I do so now.

Mr. Dean: If I might inquire, what are your plans, personal plans, Judge Ryan? Are you going to be here! I understand you are going to be away for several weeks.

The Court: My personal plans are that I will be here until around the 10th of July, and I will be able to be contacted thereafter, with the help of the Lord, while I remain on this earth. I have no intention of leaving the country, and I will at all times be in communication with the court here, and they will be with me. My plans are presently now—there is no secret about it—I intend to go to Boulder, Colorado, to the Conference at the University for about five days around the middle of July, then go up for two weeks to help out in Spokane where Judge Driver died about a year ago—was killed—and then come down to Denver for four weeks.

But there is no need that this should be delayed until my return or be delayed by my absence out of the District. It seems to me that there is ample time to prepare an order to show cause in the next two weeks or so, three [fol. 87] weeks, a simple order to show cause which will provide a method of publication such as I have indicated, as I think may be desirable, and a procedure whereby on a given return day objections may be filed in open court.

I don't want to be the clearing house for them prior

to that date. I haven't the facilities for doing it.

If you want to provide that objections can be forwarded to the Attorney General, Antitrust Division, I have no objection to that, not precluding anybody from objecting on the return date.

Mr. Dean: We would like to mail copies of all these,

all this material to each member, too.

The Court: I think you should follow the procedure which I know you are familiar with—I know Judge Pecora is familiar with—such as you might mail out in connection with an SEC compromise of a derivative stockholders suit or a prospectus, selling a new issue. It should be a full disclosure of what you plan, and perhaps you might include a statement by ASCAP, if you desire, in the form of a petition, in which ASCAP joins the position of the Government, and a petition of the Government.

But I don't know what you have in these papers. And [fol. 88] really, when I am outlining what I think is the desirable procedure, I am really outlining something concerning which I am entirely uninformed as to its substance

and nature.

Mr. Kilgore: I hate to bother the Court with this-

The Court: Don't hesitate. You are not bothering me at all. I think if we had had a discussion like this a couple of weeks ago we might have approached this, not from a different point of view, but perhaps with a greater degree of understanding and we might have had now the result that is reached.

The only thing I don't like is, I don't like to have a mass of papers like this suddenly put before me, expecting forthwith, as a matter of fact, I will sign my name. I

won't do it.

Mr. Kilgore: Well, your Honor, I think we were close to the end result that you have outlined. We had planned to do it merely through the use of using ASCAP as a means of getting notice to the people. We can modify the proposed order that—

The Court: But there is something basically different between us, and that is our philosophical approach to the responsibilities and obligations of the Court with reference [fol. 89] to these final consent decrees in antitrust litigation.

I feel that the Court has a duty, independent of that of the Antitrust Division, a duty to see that the purpose of the statute is carried out in the proposed decree.

Mr. Karsted: I think, just to clear it up, we weren't asking for the Court to sign anything forthwith. We didn't want the Court to sign anything until after objections had come in.

The Court: You wanted an order to show cause, in effect, an order authorizing circulation of this and foreclosing all those interested from filing objections after 30 days, didn't you?

Mr. Kilgore: No. Mr. Karsted: No. Mr. Dean: No.

The Court: I haven't looked at your papers, but that is what I took it to be.

Mr. Dean: No, sir.

Mr. Karsted: But before your Honor signed it, to give due notice to everybody and to give them a chance to come in. We weren't really far apart from what your Honor wanted.

[fol. 90] Mr. Finkelstein: We had in mind 30 days, but that wasn't intended to bind the Court.

The Court: I don't like the procedure, very frankly.

Mr. Kilgore: We had not expected you-

The Court: If you want to do this, in the interest of saving the time of everybody, if you will leave these papers with me, I will go over them.

Mr. Dean: I think that would be fine.

Mr. Kilgore: It would be wonderful, sir.

The Court: And then I would be willing to meet with you gentlemen at a time when you won't feel under pressure and I won't have delayed you, and I will give you definitely just what my ideas and notions are with reference to the procedure to be followed.

I doubt whether it is going to differ essentially from what. I have outlined to you today.

Mr. Kilgore: Right, sir. We certainly appreciate it.

Mr. Dean: Thank you very much.

The Court: When is it desirable? I don't believe in leaving matters hang in the air. When can you come back?

Mr. Kilgore: We will meet your convenience on it, sir-[fol. 91] The Court: You can come back here at 8 o'clock tomorrow morning or 8 o'clock Monday morning. I generally get in here at ten after 8.

Mr. Dean: I can come back tomorrow morning. I have

to be in San Francisco and Salt Lake City Monday.

The Court: Have a nice time. When will you be back from out there?

Mr. Dean: I will be back the following week, your Honor. The Court: All right, I will give you a date, if it will be agreeable to you.

Mr. Dean: We can do it tomorrow morning or the follow-

ing week.

The Court: I call the calendar here in the morning. You are going to be gone all of next week?

Mr. Dean: Yes, sir.

The Court: The 22nd to the 29th. I think we have a calendar for the 29th, in the afternoon. I can make it at half-past two on Monday, or I have an appointment here at 9.15 on Monday—I can make it early in the morning, if you want—but these men come from Washington. I will do whatever you want. I, as a rule, get in about a quarter after 8, ten after 8.

[fol. 92] Mr. Kilgore: The date is completely up to you all.

Mr. Dean: Do it any time you want to.

Mr. Kilgore": The afternoon is more convenient.

Mr. Dean: 2.30 on Monday.

Mr. Kilgore: This coming Monday?
Mr. Dean: A week from next Monday.
Mr. Kilgore: A week from next Monday?

The Court: The 29th.

Mr. Kilgore: We will be right here, sir.

The Court: All right.

Mr. Dean: Thank you very much.

Mr. Kilgore: Thank you, sir.

The Court: I hope you understand what my position is.

Mr. Dean: I understand very well.

(Adjourned to Monday, June 29, 1959, at 2.30 p.m.)

[fol. 93]

SOUTHERN DISTRICT OF NEW YORK
Civ. 13-95

UNITED STATES OF AMERICA, Plaintiff,

. CIALLS OF ILAL

VS

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., Defendants.

Before: Hon. Sylvester J. Ryan, District Judge.

Transcript of Proceedings of June 29, 1959

New York, 2.30 o'clock p.m.

APPEARANCES:

William D. Kilgore, Jr., Esq., Attorney, Department of Justice, for the Plaintiff.

Howard T. Milman, Esq., Herman Finkelstein, Esq., Ferdinand Pecora, Esq., and Frederick A: Terry, Jr., Esq., Attorneys for Defendants.

[fol. 94]. Frank Weinstein, Esq., Attorney for Certain member publishers.

Arthur Fishbein, Esq., Attorney for Certain member publishers.

Bernard A. Grossman, Esq., Attorney for Music & Talent Organization, Inc.

[fol. 95]

COLLOQUY BETWEEN COURT AND COUNSEL ON ISSUANCE OF RULE TO SHOW CAUSE

The Court: Gentlemen, I asked you to appear here today so we might consider and discuss the procedure we ought to follow in connection with the proposed modification of the final decree which was entered in this matter. It was submitted informally to me last week in two papers, and I had an opportunity to go over them and I have sent you a little private memorandum, which was private only in the sense that I felt it was not necessary to file it, it is more or less a procedural matter.

Mr. Weinstein, I note your appearance here. Why are

you here?

Mr. Weinstein: I appear for certain music publisher members of ASCAP for a great number of years. I believe I was principally responsible, together with the clients whom I represent, in having a Congressional Committee organized, of which the Hon. James Roosevelt was chairman, to investigate the affairs of ASCAP.

I appeared in Washington at the hearings, submitted witnesses and affidavits in support of our contention that the consent decree should be modified. I believe your Honor has a copy, printed copy, of the hearings and the recommendations of the Committee which was widely distributed.

[fol. 96] The Court: I do not have a copy of it.

Mr. Weinstein: I will be glad to furnish your Honor with

The Court: I will be very happy to receive one from you as a friend of the court.

Mr. Weinstein: Thank you, your Honor.

I saw one of your secretaries here when I appeared here a few days ago and I thought I saw a copy on her desk.

The Court: You might have seen it, he or she might have

seen it, but I haven't seen it. .

Mr. Weinstein: If you haven't got it. I will provide you with a copy. I haven't received a copy of the proposed decree or the memorandum. I am here, after your Honor indicates the procedure that is to be followed, to make certain suggestions for consideration of the court.

The Court: At the present time you are a stranger to the suit. And while I am glad to have you here as a member of the bar and as a representative of parties that you say may possibly be affected by the action taken by the court, your appearance at the present time is only that of a friend of the court.

then in

Mr. Weinstein: Then I am appearing as amicus curiae

[fol. 97] for the time being.

The Court: I don't know whether, I will permit you to participate even as amicus curiae. Suppose, then without giving you a fancy title, I tell you that I will be very happy to have you sit here.

Mr. Weinstein: And I will reserve my rights and make

a formal application.

The Court: You may reserve all or any rights you may have and I will be glad to have you here.

Mr. Weinstein: Thank you.

Mr. Fishbein: I am curious, that is why I am here today. I also appeared before the Roosevelt committee in Washington on behalf of one of the publisher members of ASCAP. I had read some trade paper accounts of this scheduled hearing in chambers today and as a result of curiosity I merely came down to see the proposed order. I talked to Mr. Kilgore before this hearing, and he explained the procedure, and I see no reason for me to participate, nor do I intend to participate.

The Court: The hearing is open to the public at such

informal hearing as this might be.

Mr. Grossman.: At the present time my interests are [fol. 98] being represented by ASCAP and I am a stranger to the suit.

The Court: What interests do you represent?

Mr. Grossman: A publisher company just admitted to ASCAP.

The Court! What is its name?

Mr. Grossman: Music & Talent Organization, Inc. The Court: I hope your venture proves profitable.

Mr. Grossman: Thank you, your Honor.

The Court: You gentlemen submitted to me an order to show cause and a proposed ratification of the final decree, which apparently have been consented to, and other papers in connection with the motion. You both expressed a desire that the matter be brought on for hearing in court upon some form of notice to all you felt might be affected by the proposed modification, so an opportunity may be granted to them to be heard if the court desires to hear them.

I went through your papers and through the proposed:

modification and I don't pass, as I indicated to you, upon the merits of what you agreed upon amongst yourselves—I mean the government and ASCAP. I am concerned only with the procedure that we should follow in order to enable—[fol. 99] the court to take formal action upon what I take to be a submission of this proposed consent decree modification by the court.

You both have suggested that notice be given to all of the ASCAP members. I think that is a very fair step to take and perhaps on a return day the court may receive some benefit of any observations that members of ASCAP might have to make or other parties might have to make, whose interests might be affected by the proposed modification.

There is just one thing that I particularly want to point out, and that is that I do not want to be in a position, nor will I permit myself to be in a position, where I would pass upon the respective rights of ASCAP as an organization or corporation and on its prospective members or parties who have signed contracts with ASCAP. That is a matter for ASCAP to determine itself. Nor will I pass upon the wisdom of these matters with respect to the modification in so far as it is intended to influence an action of the Antitrust Division.

I will have a hearing on this matter. I think it is desirable that a hearing be held on this matter on appropriate notice, [fol. 100] but it will be for the sole purpose of determining that the public interest will be best served by the modifications proposed and that it will serve, the proposed modifications will also serve to accomplish the ends sought to

be accomplished by the original suit as it was filed.

With that purpose in mind, perhaps I should make an additional observation. Though I may hear parties as friends of the court on the return of any notice that we provide for, I see at this time no need, necessity or occasion to permit any intervention. However, I am not now ruling that I might not change my mind in the future. However, at present I think the public interest is being amply served and protected by the Antitrust Division and presently I see no need to permit any intervention.

What suggestion has the government to make?

Mr. Kilgore: I would like to have the benefit of your thinking with respect to your reservation as to the

adjudication of contractual rights of members.

The Court: I have a right to determine whether or not any existing contract between ASCAP and its members offends either the express wording or provisions of the decree or its general purpose, or frustrates the purpose of [fol. 101] the decree. If ASCAP has, by reason of any private undertaking with any of its members, entered into any contract, I am not here to adjudicate upon whether or not ASCAP has a right to modify any existing contract with the members or not. That is for them to determine.

Mr. Kilgore: I asked the question, your Honor, because clearly the proposed order affects the outstanding rules,

many of the outstanding rules.

The Court: I have a right to direct ASCAP as an organization to modify its rules either with or without its consent. I have power under the reserve jurisdiction of a decree to direct that these modifications of the rules and regulations be made, when I feel they are necessary to accomplish the purposes of the suit. Whether or not ASCAP is complying with the decree, is violating its contract with its membership, I am not here to pass upon.

Mr. Kilgore: .The proposed order requires the consent

of its members to certain changes.

The Court: That is a matter of the internal affairs of ASCAP; it is not the concern of this court. The individual members are not parties to this suit, ASCAP is.

[fol. 102] Mr. Weinstein: There may be a difference of

opinion on that, your Honor.

The Court: At this stage, counsel, I don't want to hear from you. I will hear from you when we are completed. I will hear any observation you wish to make.

At this stage, your best function as a friend of the court,

is to wait until I ask to hear from you.

Mr. Kilgore: The two alternative suggestions as to procedure, your Honor, as to those, we prefer the second step.

The Court: The second step as I outlined it to you was that this court has jurisdiction to act upon the proposed amended final consent judgment if brought on before me by an order to show cause. I suggested that it be returnable in 120 days from the signing. If 120 days is not sufficient time to give notice which would constitute due process, we can extend the time. However, I think it should be no less than 120 days. That notice should be due and appropriately given by mail—I don't see any necessity for publication, however, I will be glad to hear you on that—to all designated as members of ASCAP. On the return of this order to show cause, an opportunity will be given to the members of [fol. 103] ASCAP to appear in connection with the proposed consent judgment, upon application to be heard by the court, and make that application upon the ground that the proposed amendments will not accomplish the antitrust purposes of the suit.

However, I want it understood that I do not intend to pass upon or adjudicate in this hearing or in this suit any contractual rights presently existing between ASCAP and its members, nor do I intimate that any strangers to the

suit will be permitted to intervene.

As I recall it, I had occasion to so comment in a ruling I made under date of October 23, 1956. I see no reason to permit an intervention, because at present I find that the Antitrust Division of the Attorney General's Office has

performed its function in carrying out the order.

Mr. Kilgore: We have drafted a proposed order which I believe embodies the substance of your suggestion, to wit, an order that the parties to the cause, the government and ASCAP, are to appear on a day certain—120 days we believe will be ample—at which time the court would hear the parties as to why the order should be approved.

[fol. 104] The Court: By the order you mean the amended

consent to the final judgment?

Mr. Kilgore: Yes.

Mr. Milman: If your Honor pleases, I should-

The Court: Suppose we let counsel finish first. Make a

note of what you have in mind.

Mr. Kilgore: What I have here may be inartistically worded, but in effect the court would direct the Society to give a copy by mail to each of its members, a copy of the consent order and of this order also, and the plaintiff should send to any member who writes to us and requests a copy

of it, a copy of our motion and a copy of our memorandum in support. Then this order which we send out to the membership recites that the members may at such hearing make application to the court to be heard on the ground that the proposed consent order will not accomplish the antitrust purposes of this suit.

This does not embody the consent that you have mentioned again here today with respect to the contractual rights. Whether your Honor believes that that should be

in.there-

. The Court: It does not have to be in here because I don't

[fol. 105] believe f have the jurisdiction to do so.

We interrupted the defendants' attorney before; you wanted to say something and I asked you to remain silent. You may now proceed.

Mr. Milman: What I wanted to say-

The Court: Give the friend of the court a copy of it.

Mr. Milman: What I wanted to say was that the document which was submitted to your Honor has been entitled a proposed consent order and not an amended final judgment. I think it is the view of the government and the view of our side that it is an order pursuant to the judgment rather than an amendment of the judgment itself, and that is why we have referred to it in the papers submitted as—

The Court: I think we are quibbling over terms, but it seems to me it is an addition to and a supplementary to a final judgment, and therefore it is an addition to the final judgment. Whether or not it is a modification is a matter of opinion. We will make it "amended final consent judg-

ment".

Have you any other comment that you desire to make? [fol. 106] Mr. Milman: No.

The Court: Now we will hear you, Mr. Weinstein, as a

friend of the court.

Mr. Weinstein: I would suggest that 120 days is not sufficient, your Honor.

The Court: What is your idea?

Mr. Weinstein: Well, 150 days, for this reason. The summer months are coming on. Most members will be away on vacation in July and August. Personally, I am going abroad Saturday, and I will be gone until September 2nd.

I suggest 150 days from the date the order to show cause is signed.

The Court: Well, 120 days makes four months.

Mr. Weinstein: Yes, and 150 days would make it five. months. I eliminate the months of July and August entirely because I don't think we can count on those months.

The Court: Except if modification should be made it is desirable that it should be put into effect as soon as possible.

Mr. Weinstein: But the members should have a complete

opportunity, your Honor.

The Court: That would make it sometime in October rather than September?

[fol. 107] Mr. Weinstein: The middle of October, your .Honor.

Mr. Kilgore: We have a problem with respect to the mechanics. I personally have no objection as such to five months, except we must take into consideration the fact that if these rules go into effect, ASCAP had hoped to be able to get their distributions under the new rules started in October.

The Court: I think four months is enough; that will give everybody time. It will be generally known in the trade. Four months is time enough. That will be July, August, September and October.

Mr. Weinstein: Yes. I miscalculated by a month.

The Court: Well, 120 days, about that, would be enough. We might even cut it down a few days. It would be desirable if we could, if these rules are approved, to put them into effect the first of the year.

Mr. Finkelstein: The fiscal year begins October 1st.

Mr. Weinstein: You can make them retroactive.

The Court: Except that makes it more complicated from the accounting and bookkeeping point of view.

[fol. 108] Mr. Fishbein: They are six months behind in their logging anyway.

The Court: I don't think it should be under 120 days.

Mr. Finkelstein: We may want to discuss the problem of putting things into effect; a lot of these things we wanted to change anyway.

The Court: There is nothing to stop you from making

any changes prior to the return date, so long as you don't

violate the terms of the decree.

Mr. Kilgore: Your Honor, that is a little bone of contention between counsel of ASCAP and the government, because we started a little over a year ago, and they made a change which we were afraid would make our case moot, so we asked them please not to make any substantial changes.

The Court: Your contention was they were violating the law. It is never wrong for someone to stop violating the

law.

Mr. Fishbein: 1 didn't mean to raise something controversial.

The Court: It is never wrong or objectionable for somebody to stop doing something that is wrong, in fact, it is desirable. If ASCAP wanted to put any changes into effect prior to the return date that did not violate the terms [fol. 109] of the decree, there is no reason why they couldn't do it.

Mr. Kilgore: The government would have no objection

to it.

The Court: That is up to ASCAP. I am not directing them to do it.

Does anybody else want to be heard?

Mr. Milman: I would like to advert to something, that is, that the plaintiff will mail upon any member's written request, a copy of its motion and memorandum in support thereof. We have agreed to send to each member a copy of the proposed consent order or modification.

The Court: I won't direct that the plaintiff mail at all. If the plaintiff wants to mail to anybody, it may do so. If you want to mail to ASCAP members copies of your memorandum, you may do so, but I don't want you to

promote propaganda in the trade.

Mr. Kilgore: We had hoped whatever order your Honor

enters would be sent to the members.

The Court: What I want mailed to the members is a copy of this order, a copy of the proposed amended consent decree with the two appendixes and a copy of those two forms of agreement that I saw.

[fol. 110] Mr. Milman: The new formulas.

The Court: They seemed to be a little different from the appendices, the writer's distribution formula and the weighing formula, a copy of these documents and a copy of this order.

Mr. Milman: And the amended final judgment of 1950.

The Court: You may send them anything else you want to as long as it is not propaganda. I don't want anything put in your letter or in your inclosure sending these documents. You can send it under separate cover if you want, but I don't want anything put in the letter other than what I have specified. If you want in addition to send them other material; argumentative in form, you many do so under a separate cover. If the government wants to send any memorandum to any of the members, they may do so under separate cover. I don't want anything in the nature of a solicitation. Judge Pecora is familiar with that, solicitation accompanying judicial notice.

Mr. Finkelstein: Anything that is explanatory, because

that may be argumentative, you don't want us to send.

The Court: You may put that in under separate cover.

[fol. 111] Mr. Weinstein: May I have a copy of these papers?

The Court: I am sure counsel will be very happy to

accommodate you.

Mr. Fishbein; May I also have a copy?

The Court: I am sure counsel will be happy to accommodate you as well.

Mr. Kilgore: I don't have extra copies here.

The Court: You can mail copies to these gentlemen. I will read to you what I have done here, gentlemen.

Upon the motion of the plaintiff-for an order to further amend the amended final judgment entered herein on March 14, 1950, for the purpose of carrying out said judgment by the proposed consent further amended final judgment attached hereto upon motion of the attorneys for the plaintiff herein, it is hereby ordered that the parties to this action should cause before this court at a hearing to be held on the 19th of October 1959, at the United States District Courthouse, Foley Square, New York, N. Y., Room

[fol. 112] 129, at 10:00 a.m., or as soon thereafter as counsel can be heard, why the proposed further amended final judgment should be approved and entered by this court.

"And it is further ordered that the defendant ASCAP will mail a copy of this order, of the amended final judgment entered on March 14, 1950, and of the proposed consent further amended final judgment to each of its members on or before July 17, 1959; and it is further ordered that any party or individual who has an interest affected by these proceedings may appear at such hearing and make application to be heard upon the ground that the proposed consent further amended final judgment will not accomplish the antitrust purpose of this suit."

Any objection to that?

Mr. Kilgore: There would be one question: whether you wanted at this time to specify that no evidence would be

taken at the hearing.

The Court: I do not want to make any reference to it at all. I may decide to take testimony: I don't know. I am not saying one way or another. I don't anticipate there will be need for it. However, I don't want to preclude myself. [fol. 113] Mr. Milman: The consent of ASCAP has been based here, as have other consent decree negotiations and other matters, on the fact that Section V of the Clayton Act would be applicable where a consent order without the taking of testimony would not operate as prima facie evidence in any other case.

The Court: At this time I am not going to say whether testimony is necessary or not. However, it seems to me that since this is an amended to a final consent decree, it would still be a consent decree. I do not think it will be

evidence of a wrong in another suit.

Mr. Finkelstein: That is what we are worried about.

The Court: If I decide to take testimony, you may withdraw your consent at any time before it is acted upon. I do not want to preclude myself from taking testimony.

Mr. Milman: I think that is very fair.

Mr. Weinstein: I respectfully submit that at the very end of the last paragraph the following words be inserted "or make such further applications as they may be advised." I am familiar with your Honor's decision in 1956 that [fol. 114] you previously referred to, where you refused to permit a member to become a party. However, I desire to call your Honor's attention to some statutory law which was not called to your Honor's attention. I would like on the return day to make an application to either become a party or appear as amicus curiae. We are entitled to become a party to the suit if it is an unincorporated association.

The Court: It is a membership corporation.

Mr. Weinstein: It is a non-incorporated association.

The Court: It exists under the membership corporation law of the State of New York.

Mr. Finkelstein: It is a common law association. It

may be sued as an unincorporated association.

Mr. Weinstein: There is a special statute which provides that the president or treasurer can be sued, representing all the members. As I represent a member, I am a party to the suit.

The Court: I am not going to pass upon it now, and I am not going to change this at this time. You may make any application on formal papers that you desire to. I am not going to entertain sort of an ex parte informal applica-[fol. 115] tion of such importance now. If you want to make an application, do it on papers and on notice, and I will listen to you and I will give you my decision as a matter of record.

Mr. Weinstein: I will do so, and make it returnable the same date.

The Court: Make it returnable at any time you want.

If this is satisfactory, I will sign it.

Mr. Kilgore: Shall we have it typed up anew?

The Court: Yes, you can have it done; it will only take a few minutes. The proposed amended consent decree, the writer's distribution formula and the weighing formula will all be annexed to this order to show cause, so we will have a batch consisting of the order, and the three documents annexed to it. All these other papers that were not acted upon by me you can have back. I am not even considering them in this application.

Mr. Kilgore: You do not desire us to file the motion?

The Court: If you want to file a formal notice of motion you may do so, but then if you do so, you must afford them an opportunity to submit an answering affidavit, be[fol. 116] cause your notice of motion, what you described as a motion, is a combination, as I pointed out to you, of a notice of motion, a memorandum and a couple of other things. If I permit this, then I must afford the defendant an opportunity to file another similar paper.

Mr. Kilgore: We had thought if we filed a motion, which you correctly described last week as a dual-purpose motion, ASCAP could come in and make a formal answer to that.

The Court: If you want that done, then give me back that order and I will make an order when I get everything before me. I am not going to issue an order to show cause now and subsequently receive other papers from ASCAP. I have no objection to you pressing this motion, and I will give ASCAP time to submit in opposition. Then I will make my own ruling.

Mr. Kilgore: We will have this order retyped, your Honor.

The Court: Have those three documents affixed to it, and I will sign it.

Do you desire to say anything else, Mr. Weinstein? [fol. 117] . Mr. Weinstein: No. sir.

The Court: Does anybody else want to be heard? Nobody. Very well.

(Hearing concluded.)

[fol. 118]

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK Civil Action No. 13-95

UNITED STATES OF AMERICA, Plaintiff,

V

American Society of Composers, Authors and Publishers, et al., Defendants.

ORDER TO SHOW CAUSE, ETC .- June 29, 1959

Upon the motion of the plaintiff for an order to further amend the Amended Final Judgment entered herein on March 14, 1950, for the purpose of carrying out said Judgment, by the proposed consent further amended Final Judgment attached thereto, and upon motion of the attorneys for the plaintiff herein, it is hereby

Ordered that the parties to this action show cause before this Court at a hearing to be held on the 19th day of October, 1959, at the United States Court House, Foley Square, New York, New York, Room 129, at 10 A.M., or as soon thereafter as counsel can be heard, why the proposed consent further amended Final Judgment should be approved and entered by this Court; and it is further

Ordered that the defendant, American Society of Composers, Authors and Publishers, mail a copy of this order, of the Amended Final Judgment entered on March 14, 1950, and of the proposed consent further amended Final Judgment to each of its members on or before July 17th, 1959; and it is further

Ordered that any party or individual who has an interest affected by these proceedings may appear at such hearing and make application to be heard upon the ground that the proposed consent further amended Final Judgment will not accomplish the antitrust purpose of this suit.

Sylvester J. Ryan, Chief Judge.

June 29th, 1959

[fol. 118a]

Note Re Attachments Pursuant to Stipulation of Counsel as to Printing Record

Clerk's Note: Please print the following notation in lieu of printing pages 49-105:

"Attached to the Order of June 29, 1959 were the proposed consent further amended Final Judgment, together with Attachments A, B and C and the Writers' Distribution Formula and Weighting Formula referred to therein. These documents, as amended by the Order entered October 8, 1959 amending said 'Weighting Formula' and by the Consent and Order entered January 7, 1960 (both of which Orders are printed elsewhere in this Record), are substantially identical to the Consent Further Amended Final Judgment entered January 7, 1960 and the documents attached thereto, which are printed elsewhere in this Record."

[fol. 176]

United States District Court Southern District of New York

[Title omitted]

Application of Arnold Saemann as to Mailing Documents— Filed July 17, 1959

State of New York, County of New York, ss.:

Arnold Saemann, being duly sworn, deposes and says: I am over twenty-one years of age and am employed by the American Society of Composers, Authors, and Publishers (hereinafter "ASCAP"). My duties include the supervision

of mailing documents to the members of ASCAP.

Exhibit "A" hereto attached is a copy of a booklet containing copies of (1) an Order signed by Chief Judge Sylvester J. Ryan on June 29, 1959, (2) a proposed consent order further amending the Final Judgment in the above action, (3) a proposed Writers Distribution Formula, (4) a proposed Weighting Formula, and (5) the Amended Final Judgment entered in the above action on March 14, 1950.

Exhibit "B" hereto attached is a copy of a letter, dated July 10, 1959, addressed to all members of ASCAP and

signed by Stanley Adams, President of ASCAP.

On the 8th, 9th and 10th days of July, 1959, envelopes were addressed to all members of ASCAP by running [fol. 177] them through the ASCAP addressograph. Thereafter, one copy each of the documents attached hereto and marked Exhibit "A" and Exhibit "B", and no other documents or material, were inserted in each of such envelopes. On the 10th day of July, 1959, at approximately 11:00 A.M. and 5:00 P.M. Eastern Daylight Saving Time, all the aforesaid envelopes, securely sealed and postpaid, first-class, were mailed at the Grand Central Station branch of the New York Post Office.

Arnold Saemann

Sworn to before me this 14th day of July, 1959.

Henry Hofschuster, Notary Public, State of New York, No. 03-6934300, Qualified in Bronx County, Certificate filed in New York County, Commission Expires March 30, 1960.

Note Re Exhibit "A" Pursuant to Stipulation of Counsel as to Printing Record

"A booklet having the following cover page, and containing the papers indicated on said cover page, and the notice To All Members of the Society appearing below, were mailed by the Society to each and every member on July 10, 1959. The papers described on said cover page are printed elsewhere in this Record."

[fol. 178]

EXHIBIT "A" TO AFFIDAVIT

AMERICAN SOCIETY OF COMPOSERS.. AUTHORS AND PUBLISHERS .575 Madison Avenue New York 22, New York

This booklet contains the papers upon which a hearing will be held on a proposed Consent Order further amending the Society's existing Consent Decree (which was first amended in 1950). Specifically, the booklet contains:

- 1—Order signed by Chief Judge Sylvester J. Ryan of the United States District Court for the Southern District of New York, providing for a hearing on October 19, 1959 with respect to a proposed Order, consented to by the Government and by the Society, further amending the Amended Final Judgment of March 14, 1950.
- 2—The proposed Order, with Attachments A, B and C thereto.
- 3-The proposed Writers' Distribution Formula.
- 4-The proposed Weighting Formula.
- 5—The Amended Final Judgment entered on March 14, 1950 in United States v. American Society of Composers, Authors and Publishers (the existing Consent Decree).

[fol. 179]

EXHIBIT "B" TO AFFIDAVIT

MURRAY HILL 8-8800 CABLE ADDRESS: ASCAP, NEW YORK

AMERICAN SOCIETY OF COMPOSERS, AUTHORS
AND PUBLISHERS
575 Madison Avenue
New York 22, N. Y.

STANLEY ADAMS
PRESIDENT

July 10, 1959

To All Members of the Society:

Pursuant to an Order signed by Judge Ryan, the Society is sending you the enclosed booklet, which contains: (1) the Order signed by Judge Ryan on June 29, 1959, (2) the proposed consent order, with three attachments thereto, (3) the proposed Writers' Distribution Formula, (4) the proposed Weighting Formula, and (5) the Amended Final Judgment entered on March 14, 1950 in *United States* v. ASCAP (the existing consent decree).

For some time the Society has had negotiations with the Department of Justice in respect to the Amended Final Judgment of 1950. As a result of those negotiations, the proposed consent order with attachments thereto (which would further amend the Amended Final Judgment), the proposed Writers' Distribution Formula and the proposed Weighting Formula have been submitted to Judge Ryan for approval and have been filed in the United States District Court for the Southern District of New York. A hearing thereon has been set for October 19, 1959.

Sincerely yours,

/s/ STANLEY ADAMS
Stanley Adams
President

[fol. 180]

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW-YORK Civil Action No. 13-95

[Title omitted]

Affidavit of Edward Rosenberg as to Mailing Documents
—Filed October 9, 1959

State of New York, County of New York, ss.:

Edward Rosenberg, being duly sworn, deposes and says:

I am over twenty-one years of age and am employed by the American Society of Composers, Authors and Publishers (hereinafter "ASCAP"). My duties include the supervision of mailing documents to the members of ASCAP.

Exhibit A hereto attached is a copy of a booklet containing copies of (1) a letter dated July 21, 1959, addressed to all members of ASCAP and signed by Mr. Stanley Adams, President of ASCAP, (2) a letter dated July 21, 1959, addressed to Mr. Stanley Adams and signed by Arthur H. Dean, Esq., (3) a "Memorandum prepared for the information of the members of ASCAP, with respect to the proposed Consent Order to be submitted to Chief Judge Ryan on October 19, 1959," signed by Arthur H. Dean, Esq., and (4) a press release issued by the Department of Justice on June 29, 1959.

On or about July 20, 1959, envelopes were addressed to all members of ASCAP by running them through the [fol. 181] ASCAP addressograph. Thereafter one copy of Exhibit A, and no other documents or material, was inserted in each of such envelopes. On July 21, 1959, all the aforesaid envelopes, securely sealed and postpaid, first-class, were mailed at the Grand Central Branch of the New York Post Office.

Edward Rosenberg

Sworn to before me this 8th day of October, 1959.

Henry Hofschuster, Notary Public, State of New York, No. 03-6934300, Qualified in Bronx County, Certificate filed in New York County, Commission Expires March 30, 1960. [fol. 182]

EXHIBIT "A" TO AFFIDAVIT

MUrray Hill 8-8800 Cable Address: ASCAP, New York

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS 575 Madison Avenue New York 22, New York

STANLEY ADAMS President

July 21, 1959

To All Members Of the Society:

In connection with the proposed Consent Order which will be submitted to Chief Judge Ryan on October 19, 1959, the Society has already mailed to each of the members copies of the Notice of Hearing, the proposed Consent Order and three attachments thereto, the proposed Writers' Distribution Formula, the proposed Weighting Formula, and a copy of the Amended Consent Judgment of March 14, 1950.

When the Department of Justice raised the question whether the Society's practices were in compliance with the Amended Consent Judgment, the Society retained Mr. Arthur H. Dean of the law firm of Sullivan & Cromwell as special counsel.

Extended negotiations with the Department of Justice resulted in agreement by the Department and the Society on the terms of the proposed Consent Order, which has the unanimous endorsement of the Board of Directors of the Society as being consistent with the interests of the general membership.

I enclose, for the information of the membership, a letter from Mr. Dean to which are attached a memorandum summarizing the significant provisions of the proposed Consent Order and a copy of the press release issued by the Department of Justice containing an announcement by Attorney General William P. Rogers when the proposed Consent Order was filed with the Court.

The Society will be glad to answer any questions which any of the members may have with respect to the proposed Consent Order.

Sincerely yours,

STANLEY ADAMS, President

[fol. 182a] SULLIVAN & CROMWELL

48 Wall Street, New York July 21, 1959

Mr. Stanley Adams, President,
American Society of Composers,
Authors and Publishers,
575 Madison Ayenue,
New York 22, N. Y.

Dear Mr. Adams:

I enclose a memorandum with respect to the proposed Consent Order to be submitted to Chief Judge Ryan on October 19, 1959, which would further amend the Amended Final Judgment of March 14, 1950 in the action United States of America v. American Society of Composers, Authors and Publishers et al. This memorandum summarizes the provisions of the proposed Consent Order in terms of their effect on the members of the Society.

Also enclosed is a copy of the press release issued by the Department of Justice on June 29, 1959, at the time the proposed Consent Order was filed with the Court.

I recommend that the Society circulate both of these documents generally to the members of the Society, as soon as possible, so they will have the information for some time in advance of the hearing before Chief Judge Ryan.

Very truly yours,

ARTHUR H. DEAN

(Enclosures)

[fol. 182b]

Memorandum prepared for the information of the members of ASCAP, with respect to the proposed Consent Order to be submitted to Chief Judge Ryan on October 19, 1959

The action United States of America v. American Society of Composers, Authors and Publishers, et al., Civil Action No. 13-95, was commenced in the United States District Court for the Southern District of New York 18 years ago on February 26, 1941 when the Department of Justice filed a complaint alleging that the Society was operating in violation of the Federal Antitrust laws. On March 4, 1941, a consent judgment was entered containing certain limitations upon future activities of the Society.

This judgment was amended by consent on March 14, 1950. The amended judgment, which will be referred to

as the "Judgment" is currently in effect.

The Department of Justice some time ago advised the Society that it would seek an order construing and enforcing the Judgment and requiring certain changes in the rules and practices of the Society. After a series of negotiations between the Department and the Society, the proposed Consent Order was drafted, and has been approved by the Government and unanimously approved and endorsed by the Society's Board of Directors.

At the hearing before Judge Ryan to be held October 19, 1959, the proposed Consent Order will be presented to

the Court for approval and signature.

Pursuant to the order of Judge Ryan, the Society has already sent each member the following documents:

- Notice of Hearing before Judge Ryan on October 19, 1959.
- 2. Amended Final Judgment dated March 14, 1950.
- [fol. 182c] 3. Proposed Consent Order, with Attachments A, B and C thereto.
 - 4. Proposed Writers' Distribution Formula.
 - 5. Proposed Weighting Formula.

The Consent Order covers the following subjects:

- (i) Compensation to resigning members for performances of works which continue to be licensed by the Society;
- (ii) A scientific survey of performances on the various media such as network radio, local radio, network television and local television;
 - (iii) Distributions to writer members;
 - (iv) Distributions to publisher members;
- (v) Weighting of credit awarded compositions for uses as themes, jingles, background music or cue or bridge music;
- (vi) Allocation of votes among the writer and publisher members of the Society;
 - (vii) Distribution of receipts from foreign societies;
- (viii) Information to members and complaint procedures; and
 - (ix) Admission to membership.

The proposed Consent Order contains provisions with respect to each of the above matters. The following is a brief description of the changes which would follow the approval of the proposed Consent Order and the amendment of the Articles of Association:

[fol. 182d]

I. RESIGNING MEMBERS

A resigning member shall continue to receive distributions from the Society for performances under licenses granted prior to his resignation so long as no other performing rights licensing organization has the right to license the performance of such works in the United States, as well as for the performances occurring while the Society continues to have the right to license his works in the United States because of the continued membership in the Society of a publisher or co-writer of such work and no other performing rights organization has such right.

. II. THE SURVEY

ASCAP will survey performances of its members' works in accordance with a scientific survey designed by independent experts.

- A. Network Programs. The Society will continue to obtain logs of all programs on the three major television networks and all commercial programs on the two radio networks from which ASCAP receives the most revenue. (Radio network sustaining programs other than certain serious music programs will be sampled in the local survey.) The number of credits awarded for network performances will depend on (1) the revenue received by the Society from the networks (taking into consideration the value of local spot announcements adjacent to and reasonably attributable to network programs) and (2) the number of stations hooked into the emanating program.
 - B. Local Programs. Local radio and television programs will be sampled by the Society by a random sample of local stations. Each sample will consist of a tape recording of three continuous hours of broadcasting. It is proposed to increase by at least 50% the number of samples presently being taken in the local radio survey.

[fol. 182e] For purposes of sampling, the country will be divided into a number of geographic areas. Each area will be subdivided for sampling purposes into groups of stations, depending upon the revenue received by ASCAP. The number of samples allocated to each sampling unit will be in proportion to the revenue which ASCAP receives from the stations in the sampling unit.

The credits awarded for performances reflected by the sampling will be determined scientifically by the application of two factors:.

- (i) The depth of sampling, i.e., the relationship between the number of hours being sampled in any sampling unit to the total number of hours that the stations in the sampling unit are on the air, and
- (ii) The average revenue which ASCAP receives from the relevant group of stations, in relation to

ASCAP's total revenue from local radio or local television licensees. (For convenience, stations will be grouped into revenue bands, e.g., stations paying the Society between \$5,000 and \$10,000 per year will all be grouped and treated alike.)

Application of these two factors will determine the number of performance credits awarded to a performance reflected by the local survey.

C. Changes in Revenue Distribution. It is anticipated that credits attributable to network radio performances will, in the future, be substantially reduced, and the credits attributable to local radio will be correspondingly increased, to reflect the percentages of the total radio revenue of the Society attributable to the two sources. Aggregate credits for network television and for local television will respectively reflect the relative income of the Society attributable to those sources.

[fol. 182f] D. Review of Survey. The survey will be periodically reviewed by an independent expert to be appointed by the Court. The Government has reserved the right to seek additional relief with respect to the proposed survey if it has not been conducted in accordance with scientific principles or if the local sample is not of sufficient size or accuracy to permit a reasonably accurate distribution of the Society's revenues on the basis of its results. In any such proceeding, the Society may ask the Court to take into account the added cost of an increase in the sample size.

The foregoing represents a very general layman's description of the new survey, the details of which are necessarily highly technical, and, in some instances, remain to be finally worked out. To describe such details in full would be to attempt to write a treatise on the mathematics of sampling and the mathematical laws of probabilities.

III. DISTRIBUTION TO WRITERS

The proposed Consent Order requires a number of changes in the present system of writer distribution. The

principles governing writer distribution are set forth in Section III and in Attachment A of the proposed Consent Order. The detailed distribution system is set forth in the Writers' Distribution Formula, which the Consent Order provides is initially in compliance therewith.

- A. Current Performance Fund. The Society will continue to distribute 20% of the writers' distributable revenue through the Current Performance Fund.
- B. Average Performance Fund. This fund replaces the former Sustained Performance Fund. 30% of the writers' distributable revenue will be distributed on the basis of each writer's five-year average of performance credits. (Members will no longer have an option to select a ten-year average.) For most writer members, average performance [fol. 182g] points will be determined simply by dividing the member's five-year average of performance credits by a specified figure (initially, 40). In Classes 975 and above, an increasingly large number of average performance credits per point will be required (for example, a minimum of 50 credits per point in Class 1000, a minimum of 114 credits per point in Class 1100, etc.), continuing the present practice of the Society. Below Class 975, promotions in classification will be spread over two years and demotions will be spread over three years, except that there is a fouryear transition period for demotions from the present Sustained Performance Fund classifications.
- C. Recognized Works Fund. This fund replaces the former Availability Fund and will be computed in the same fashion as the Average Performance Fund (including limitations on promotions and demotions) except that performance credits will be awarded only on the basis of works which have appeared in the Society's survey after the expiration of four quarters commencing with the quarter in which a performance of the work was first recorded in the Society's survey.
- D. Membership Continuity Fund. This fund replaces the former Seniority Fund. Distribution will be based on continuous quarter years of membership (not to exceed 42

years) multiplied by the writer's average performance points.

E. Current Performance Election. For members not wishing to receive distribution through the four funds described above, an option is provided in the proposed Consent Order to receive distribution on a current performance basis, i.e., a writer electing the current performance basis will receive the same percentage of the writers' total distributable revenues (after providing for special awards under Section VI below, page 12 of this memorandum) as the [fol. 182h] number of his current performance credits bears to the total number of current performance credits of all writer members. There is a limitation, however, that, such election may be withheld from the approximately 100' writers with the highest five-year averages of performance credits. So long as such election is withheld, there is a further limitation that, for credits above 39,000 (or such higher limit as the Society may determine), the member will receive distribution through the four funds described above.

F. Writers in Classes 975 and Above. At present, except for the Current Performance Fund, the number of performance credits per classification point increases in Class 975 and above. The result is that writers with the highest number of performance credits receive a reduced distribution per performance credit, and the amount of reduction increases with each increase in classification. The application of this principle has resulted in an increased distribution to the vast majority of the writer members.

The continuance of this principle, and the withholding from these writers of the current performance election, will depend upon the consent of a majority (both in number of members and in number of average performance credits of members) of the writer members so affected who vote in a special election to be held for this purpose after the entry of the proposed Consent Order. If the result of the vote is to approve the continuation of the present principle, future opportunities to vote on further continuance are provided.

IV. DISTRIBUTION TO PUBLISHERS

The proposed Consent Order requires a number of changes in the present system of publisher distribution.

- A. Current Performance Fund. Initially, 55% of the publishers' distributable revenue will be distributed on the [fol. 182i] basis of current performance credits. Starting with the October 1960 distribution, the amount distributed through this fund will increase at the rate of 3% per year patil it reaches 70% in October 1964.
 - B. Recognized Works Performance Fund. 30% of the publishers' distributable revenue will be distributed on the basis of works performed after the expiration of four quarters commencing with the quarter in which the performance of such work was first recorded in the Society's survey. Distribution will be based on such credits received in the latest available preceding fiscal survey year, rather than on a five-year accumulation as at present.
 - C. Membership Continuity Fund. Distribution from this fund will be based upon the number of continuity points of each publisher, determined by multiplying its quarters of membership by the performance credits received by such publisher. Initially, 15% of the publishers' distributable revenue will be distributed from this fund. Starting with October 1960, this will be decreased at the rate of 3% per year until the fund is discontinued in October 1964.
 - D. Current Performance Election. Any publisher member may elect, as provided in the proposed Consent Order, to receive distribution solely on a current performance basis. For the fiscal survey year starting October 1, 1959, an electing publisher will receive 75% of what it would have received if all publisher distributions for that year had been made solely on a current performance basis. This percentage increases by 5% per year until it reaches 100% for fiscal survey years starting October 1, 1964 and thereafter.

V. WEIGHTING OF PERFORMANCES

The plan for weighting performances is contained in two documents which the members have already received, one [fol. 182j] entitled "Weighting Rules", appearing at pages 29-34 of the proposed Consent Order, and the other entitled "Weighting Formula", appearing as a separate document. The "Weighting Rules" constitute the principles to which the "Weighting Formula" must conform. The "Weighting Formula" spells out in detail the manner in

which performance credits are to be awarded.

The proposed Consent Order will require changes in the present weighting of performances of works as themes and jingles and as background, cue and bridge music. The variation between maximum and minimum credit for such uses will be reduced substantially. Furthermore, a new test will be adopted to qualify a work for maximum credit for such uses, such test to be based on the work's history of prior performances other than as a theme or jingle or as background, cue or bridge music.

- A. Feature Performance. All uses except those credited as themes, jingles, background music or cue and bridge music (as defined in Section A of the Weighting Formula) are described as "feature performances". Each feature performance of a work will be awarded full credit, except that (i) each repeated use of the same work on a single program will receive only one-tenth credit, with a maximum of two full credits for any single program and (ii) credit will not be allowed for more than eight feature performances per quarter hour.
- B. Themes. A "qualifying work" (as this term is defined in paragraph F below), when used as a theme, will be awarded full credit (or 75% or 50% or 25% credit, depending upon its past history of feature performances) for all such uses within the first hour of any two hour period, and one-tenth of the applicable credit for all additional such uses during the second hour. A non-qualifying work used as a theme will receive one-tenth credit for all such uses within the first hour of any two-hour period and [fol. 182k] 1% credit for all additional such uses during the second hour. Musical works (other than jingles) used in conjunction with a commercial announcement will receive the same credit as a theme.

- C. Jingles. A jingle is defined as a musical message containing commercial advertising matter where (i) the musical material was originally written for commercial advertising purposes or (ii) the performance is of a musical work, originally written for other purposes, with the lyrics changed for commercial advertising purposes with the permission of the member or members in interest. Only 1% credit will be awarded for all uses of a work as a jingle during the first hour of any two hour period and 1/10 of 1% for all such uses during the second hour. When an advertiser obtains special permission of the members in interest, compensation can be obtained by such members directly from the advertiser.
- D. Background Music. A qualifying work used as background music will receive full credit or one-half credit depending on its history of prior feature performances. Non-qualifying works will receive 20% credit if they have been commercially published for general public distribution and sale, if commercial recordings have been made as "singles" for general public distribution and sale, and if five feature performances of the work have been recorded in the local radio sample survey in the five preceding fiscal survey years. For each repeated use on a single program, only one-tenth of the credit provided above will be awarded, with a maximum of two times the credit awarded for the initial performance.

Other non-qualifying background music on each program will receive, for each three minutes' duration in the aggregate for that program, 20% credit; fractions of three minutes will be computed on the basis of 5% for each 45 seconds or major fraction thereof.

[fol. 182 i] E. Cue and Bridge Music. A qualifying work used as cue or bridge music will receive 10% credit for all uses during the first hour of any two-hour period and 1% credit for all such uses in the second hour. A non-qualifying work will receive 1% credit for all uses during the first hour and 1/10 of 1% credit for all such uses in the second hour.

F. Qualifying Works. A qualifying work is one which has (i) an accumulation of 20,000 feature performance credits since January 1, 1943 and (ii) an accumulation of 2,500 feature performance credits during the five latest available preceding fiscal survey years, toward which not more than 750 credits shall be counted for any one year.

Works first performed before January 1, 1943 shall be presumed to have accumulated 20,000 feature performance credits if the fitle of such work appears in the book Variety Music Cavalcade, or among the top ten on the "Lucky Strike Hit Parade" or the top ten on the weekly list of the most popular songs published in Variety or Billboard. Reference may also be made to the same sources for works first performed between January 1, 1943 and October 1, 1955, when the Society's records started to distinguish between feature and non-feature performances.

A work which has accumulated 2,500 feature performance credits in the five latest available fiscal survey years can receive 75%, 50% or 25% credit when used as a theme if it has accumulated 15,000, 10,000 or 5,000 feature performance credits, respectively, since January 1, 1943, or 50% credit when used as background music if it has accumulated 10,000 feature performance credits since January 1, 1943.

There are special provisions for works first performed within the five preceding fiscal survey years, as well as for adjustment of the qualifying number of feature performance credits in years when the total of all ASCAP perform—[fol. 182m] ance credits recorded in the Society's survey was less than 20,000,000 or more than 30,000,000.

G. General Limitations. The Weighting Formula contains limitations on the total credit to be awarded any work when used in different ways in any two-hour period, such as performances both as background music and as a theme, etc. There is also a general limitation permitting not more than 5% credit in the aggregate for all works (except feature performances) performed on a dramatic program of 15 minutes or less which is presented in serial form two or more times weekly.

VI. SPECIAL AWARDS

The writer members of the Board of Directors may allocate an amount not exceeding 5% of the writers' total distributable revenue for the purpose of making special awards to writers whose works have unique prestige value for which adequate compensation would not otherwise be received by such writers, and to writers whose works are performed substantially in media not surveyed by the Society. The distribution of such awards will be determined by an independent panel appointed for that purpose by the writer members of the Board of Directors. Thirty days prior to payment of any such awards, the Society shall send to all of its writer members a list of all award recipients and the amount awarded to each.

VII. SYMPHONIC AND CONCERT WORKS ETC.

Works which require four minutes or more for a single, complete rendition thereof, and which in their original form were composed for a choral, symphonic, or similar concert performance (including chamber music), will receive the [fol. 182n] following credit when performed for the periods of time indicated:

Min	utes of Actual Performance	The Ot	The Otherwise Applicable Credit Is Multiplied by:			
	4:00 - 5:30			2		
	5:31 – 10:30		/	5		
	10:31 - 15:30			9	,	
	15:31 - 20:30		/	14		
	21:31 - 25:30			20		
4	Each additional five minutes or part thereof			add 8		ć

A. The license fees which the Society receives from concert and symphony halls will be multiplied by five in determining the credit to be awarded for performances of works in concert and symphony halls.

B. Performances on national radio network sustaining programs consisting of concerts by symphony orchestras which are presented as a genuine contribution to the culture of the nation will be awarded credit equal to performances on a radio network of 50 stations.

VIII. FOREIGN REVENUE

If the revenue which the Society receives from any foreign source exceeds \$200,000, and to the extent that the reports furnished by such source allocate credit among the members of the Society and among compositions in reasonably identifiable form, distribution of the revenue from such foreign source will be made separately on the basis of such reports. This would include Canada, England, Sweden, and the non-film revenue received from France and Germany. Other revenue received from foreign sources will be dis-[fol. 1820] tributed on the basis of the Society's most reliable information as to foreign performances generally.

IX. VOTING

- A. Each writer member and each publisher member of the Society is limited to a maximum of 100 votes. The number of votes of a member will no longer be based on the amount of money he received from the Society in the preceding year but will be based solely on the performance credits received by him during the latest available fiscal survey year. Votes will be awarded on a sliding scale, as follows:
 - (1) Writer Members: Each writer member who has received any performance credits in the latest available preceding fiscal survey year shall have one vote, plus (i) one vote for each 1,000 credits up to 20,000 credits, plus (ii) one vote for each 2,000 credits from 20,001 to 26,000 credits, plus (iii) one vote for each 3,000 credits from 26,001 to 35,000 credits, plus (iv) one vote for each 4,000 credits from 35,001 to 51,000 credits, plus (v) one vote for each 5,000 credits from 51,001 to 101,000, plus (vi) one vote for each 6,000 credits in excess of 101,000 credits, with a maximum of 100 votes.

- (2) Publisher Members: Each publisher member who has received any performance credits in the latest available preceding fiscal survey year shall have one vote, plus (i) one vote for each 4,000 credits up to 100,000 credits, plus (ii) one vote for each 8,000 credits from 100,001 credits to 140,000 credits, plus (iii) one vote for each 12,000 credits from 140,001 to 200,000 credits, plus (iv) one vote for each 16,000 credits from 200,001 to 408,000, plus (v) one vote for each 20,000 credits in excess of 408,000 credits, with a maximum of 100 votes.
- [fol. 182p] B. The above formulas will be adjusted for increases or decreases in the total number of performance credits recorded by the Society. Furthermore, if at any time there is an increase of more than 10% in the percentage of the total publisher votes represented by the ten publisher members and "groups of affiliated publisher members" having the highest number of "publisher votes, the publishers' voting formula will be adjusted to bring such publishers within 10% of such percentage.
- C. In any election for the Board of Directors the nominees shall include any person eligible to be a director who is designated by a petition subscribed to by 25 or more members entitled to elect such director.
- D. Any group of writer members entitled to cast one-twelfth of the votes of all writer members may elect any eligible person a director by signing and presenting a petition to that effect 90 days before any scheduled election of directors. If that occurs, the number of writer directors to be elected in the general election will be reduced accordingly and the members signing the petition will not be entitled to vote in the general election. A member may not sign more than one such petition. Similar provision is made for electing publisher directors.

X. INFORMATION PROCEDURES

A. Anyone who has been a member of the Society for one year may inspect a current list of members and their mailing addresses. 3. Each year the Society will prepare alphabetical lists compositions receiving performance credits and the numof credits received by each during the preceding year 1, as to each composition which received credits a mes, background music or cue and bridge music, the 1.182q] Society will maintain records showing the numof feature performance credits received by each during preceding five years. Any member or his authorized and may inspect these lists and records with respect to own compositions, and may inspect other portions reof to the extent that inspection is sought in good faith connection with any financial interest of such member a member. All other records relating to distribution will open for inspection for good cause.

XI. COMPLAINT AND APPELLATE PROCEDURES

A special board, elected in the same manner as the Board Directors, will be established with jurisdiction in the first tance over every complaint by a member relating to his tribution or to any rule or regulation directly affecting tribution to him. Any such complaint must be filed within the months after receipt of the annual statement or the e or regulation on which the complaint is founded. A cert appeal may be taken from a decision of the special and to an impartial panel of the American Arbitration sociation, which may rule on the interpretation or applition of any order, rule or regulation, rectify errors, or id rules or regulations of discriminatory or arbitrary aracter.

XII RETROACTIVE ADMISSION OF MEMBERSHIP

Any person previously denied admission to membership ay have his application reconsidered and, if his previous plication should have been accepted, his membership shall retroactive to the date of the original application or arch 14, 1950, whichever is later.

ol. 182r] XIII. CONSENT OF MEMBERSHIP

It will be noted that the proposed Consent Order has been proved and consented to by the attorneys for the Depart-

ment of Justice and by the attorneys for the Society. The attorneys for the Society signed this document with the

unanimous approval of the Board of Directors.

However, certain provisions of the proposed Consent Order cannot be made effective without amendment of the Society's Articles of Association and any such amendment must be voted by the membership under the voting rules now in effect. Thus, it will be necessary for the membership to approve amendments which would bring the Articles of Association into conformity with the proposed Consent Order. If the proposed Consent Order is signed by the Court, the amendments will be submitted to the membership for voting within three months thereafter and the Board of Directors will unanimously recommend approval by the membership.

If the amendments are not approved by the membership, the Consent Order will be nullified and vacated, and the questions raised by the Department of Justice will have to

be litigated.

XIV. GENERAL

There has been summarized above the more significant provisions in the proposed Consent Order, as well as the Writers' and Publishers' Distribution Formulas and the Weighting Formula which will be put into effect if the Consent Order is approved. To keep this summary within reasonable limits, reference has not been made to every provision in these documents. It is therefore recommended that these documents be read in full by each member. [fol. 182s] The Board of Directors, with the advice of counsel, has approved the proposed Consent Order in order not to have to litigate whether the Society's current practices and policies with respect to the matters discussed above comply with the 1950 Amended Final Judgment of the Court, and because, in the Board's judgment, the contemplated changes are consistent with the interests of the general membership of the Society.

ARTHUR H. DEAN

[fol, 182t] DEPARTMENT OF JUSTICE

FOR IMMEDIATE RELEASE MONDAY, JUNE 29, 1959

Attorney General William P. Rogers today announced the filing in the Federal District Court in New York City of a proposed Order directing the American Society of Composers, Authors and Publishers (ASCAP) to carry out in certain specific, detailed ways the terms of an antitrust judgment entered against the Society in 1950. ASCAP is composed of approximately 1,200 publishing concerns and 4,000 authors and composers. The terms in question related basically to the rules and regulations of ASCAP governing the distribution to its members of over \$28,000,000 annually which the Society receives from licensing the commercial use of the copyrighted music composed or published by its members. These licenses are to the radio and television industry and the more than 25,000 other users such as hotels, bars, skating rinks and restaurants.

At the time the proposed order was submitted to the Court it was pointed out that ASCAP after pre-filing negotiations had agreed to the terms of the order. The Court entered an order requiring the parties on October 19, 1959 to show cause why the proposed Order should be entered and directed ASCAP to mail a copy of the proposed Order to each member and the members may then make application to be heard pursuant to the terms of the show cause order.

The practices which the proposed order seeks to remedy, relate to six fundamental factors. These factors relate to the conduct of ASCAP in its dealings with its members or concern the manner in which it divided the amounts of its revenues due its publisher and writer members.

[fol. 182u] Thus:

(1) The proposed order requires that ASCAP pay resigning members on the same basis as others when the Society continues to license their works. Resigning members are thus permitted to continue licensing existing copyrights

through ASCAP when a co-writer or publisher is also licensing the same work through ASCAP. But the resigning member is free to license new works through another organization.

- (2) ASCAP would be ordered to conduct a scientific census or sample of performance of its members' compositions. The results of the survey must be weighted in proportion to what the Society receives from the licensees where the surveyed performances occurred. A provision is included to permit re-examination by the Court of the survey after 18 months of operation. A court appointed expert will report to the Court and the Government on the design and operation of the survey and will prepare estimates of the accuracy of the samples of performances.
- (3) Each ASCAP writer would be given an option to receive payment based on the results of the survey or in the alternative to receive payment based on such factors as a five year average of performances of "recognized works" and on the length of time the writer has been a member of ASCAP. (A "recognized work" is defined as one which has received performance credit in the ASCAP survey at least one year prior to the performance in question). The proposed order seeks to assure the maximum feasible area of individual choice. An exception from these options is made for the top one hundred writers in ASCAP. These writers may vote to deny themselves the option to receive payment on a per performance basis.

Each publisher member would be given an option to receive payment on the basis of the results of the survey. In the alternative, a publisher may take into account the length [fol. 182v] of his ASCAP membership and the number of

performances of his "recognized works".

The order contains detailed provisions governing payment for theme songs, background music on dramatic programs, advertising jingles, copyrighted arrangements of works in the public domain, and serious compositions of more than three minutes duration.

(4) ASCAP would be directed to weight the votes of its members, if at all, only on the basis of the performance

credits which they received in the survey. No member may have more than 100 votes. This is in sharp contrast with the existing practice where the publisher members having the most votes in 1957 had 1,469 votes and the writer member having the most votes in that year had 5,116 votes. A progressively higher number of performance credits is required for each vote above twenty. Provision is made to permit a minority of one-twelfth to elect a director. The ten largest groups of affiliated publishing firms are limited to a maximum of slightly less than forty-one percent of the total publisher vote.

- (5) ASCAP would be ordered to keep certain records and make them available to any member upon various conditions. ASCAP must make the addresses of its members available to other members and it must inform the membership of all changes in its rules affecting distribution to the members. Provisions are included designed to speed up direct appeals to the impartial panel of arbitors. Other procedural safeguards are included to protect the rights of members in these appeals.
- (6) ASCAP would be required to admit all qualified applicants for membership and to publicize the qualifications for membership twice a year in certain trade papers.

[fol. 183]

United States District Court Southern District of New York

[Title omitted]

APPLICANT'S NOTICE OF MOTION RETURNABLE SEPTEMBER 1, 1959, FOR AN ORDER DIRECTING THE PLAINTIFF TO ANSWER "INTERROGATORIES," THE SUPPORTING AFFIDAVIT OF HERBERT CHEVETTE DATED AUGUST 25, 1959, THE EXHIBITS THERETO AND THE MEMORANDA ENDORSED ON SAID MOTION BY CHIEF JUDGE RYAN AND JUDGE DIMOCK

SIRS:

Please Take Notice that upon the annexed affidavit of Herbert Cheyette, attorney for Sam Fox Publishing Company, Incorporated, a party who has an interest affected by these proceedings, and on behalf of all other parties similarly situated, sworn to the 25th day of August, 1959 with Exhibits A and B thereunto annexed, the order of this Court dated June 29th, 1959 and the proposed consent further amended Final Judgment herein, the undersigned will move this Court on the 1st day of September, 1959 at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, in Room 506 of the United States Courthouse, Foley Square, in the Borough of Manhattan, City of New York, for an order pursuant to Rule 37 directing the plaintiff to answer the interrogatories listed below:

Interrogatories

- 1. With respect to provision III-E of the proposed order (p. 8):
 - A How many foreign societies furnish remittances of more than \$200,000.00 per year to ASCAP?
 - a. If any, name them.
 - b. If any, state the number of years the remittances have been more than \$200,000.00.

- B How many foreign societies make remittances to ASCAP?
- [fol. 184] 2. With respect to provision IV-B of the proposed order (pp. 9 ff.)

Using the last annual ASCAP remittances to publishers as a basis with respect to the proposed new publishers voting formula, state the following:

- a. The number of votes that will be cast by each of the publisher members and affiliated publishers now represented on the Society's Board of Directors? What percentage of the total possible vote will said Board of Directors and affiliated publishers control?
- b. State the number of votes capable of being cast by the 50 publishers receiving the greatest distribution from the Society. Indicate which, if any, of these 50 publishers are affiliated with each other.
 - c. State the total number of publishers who will have one vote
- d. State the total number of votes capable of being cast.
- *e. With respect to the election of the Board of Directors by the writers and publishers, respectively, for the past 9 years, provide a breakdown and tabulation indicating the total possible vote in each election and the votes actually cast.
- *f. What percent of the publishers' total distribution of revenue was received by board publisher members and their affiliates during the last five years.
- 3. With respect to provision IV-E of the proposed order (p. 10):
 - a. Excluding the publishers represented on the Board of Directors and their affiliated compa-

nies what is the minimum number of publishers that will be capable of combining so as to constitute one-twelfth of the total possible vote.

- •b. Under the cumulative voting procedure provided in IV-E when is it assumed that any group will learn:
 - The number of votes they are entitled to as individuals.
 - 2. The percentage their combined ballots constitute of the total possible vote.
- 4. With respect to provision IV-B of the proposed order (p. 9):
 - a. State the number of years each of the publishers currently represented on the Board of Directors, has had a representative on the Board of Directors.
- [fol. 185] 5. With respect to the proposed "Weighting Rules", Section 5-B (p. 32):

Of the 377 works owned by publishers represented on the Society's Board of Directors being used as themes and having accumulated 20,000 credits as of April 2, 1958, according to the ASCAP affidavit "A-14" in the appendix to the record of the hearings before Sub-Committee No. 5 of the Select Committee of Small Business, House of Representatives, page 538, question 9, how many of these works accumulated their 20,000 credits in the two years first succeeding the first performance recorded in the ASCAP survey?

6. With respect to the proposed "Weighting Rules", Section 5-B (p. 32):

For each year beginning January 1, 1943 state-

- a. The type of survey employed by ASCAP, if any.
- b. The media surveyed, if any.

- c. The type of sample, if any.
- d. The data taken, if any.
- e. Type of records kept and presently extant in the files of the Society.

State generally the information and data shown in the above records with respect to each of the years in question.

7. With respect to the proposed "Weighting Rules" Section 5-B (p. 32):

What is the first date on which ASCAP surveyed the following:

- a. Local radio stations.
- b. Network radio stations.
- c. Local TV stations.
- d. Network TV stations.
- e. What is the date on which a procedure was first instituted whereby reference tapes were taken on a continuing basis of performances in each of the above?
- f. What is the date on which an objective sample was first instituted by the Society?
- [fol. 186] g. With respect to the media mentioned above, what is the date on which types of uses were first indicated in the ASCAP survey?
- h. With respect to the media mentioned above, what is the date on which duration of performance was first indicated?
- i. What is the significance of the dates January 1, 1943? October 1, 1955?
- *8. With respect to the proposed "Weighting Rules" section 5-B (p. 32):

What percent of the ASCAP income has been distributed during the past five years by reason of:

- a. Featured performance.
- b. Themes.
- c. Jingles.
- d. Background music.
- e. Cue and bridge music.

What percent of the logged performances in the ASCAP survey are attributable to the above?

9. With respect to the proposed "Weighting Formula" provision F (p. 10):

What percent of the uses in the following media are "live" and what percent "recorded", according to the current ASCAP survey.

- a. Radio network.
- b. Local radio.
- c. TV network.
- d. TV local.

all of which interrogatories except those indicated by an asterisk were communicated to plaintiff on July 14th, 1959. With respect to the above interrogatories, it is not necessary to mention any publisher by name.

[fol. 187] The undersigned will further move the court to direct that Joel Dean be available to testify at the hearing to be held in this proceeding on October 19th, 1959.

The undersigned alleges that each of the foregoing interrogatories will elicit evidence relevant and material to the matters involved in the above action and that such evidence is in the sole possession, custody or control of the parties to this proceeding, and is not available to interested parties from any other source.

The undersigned further alleges that Joel Dean was hired as an expert by the defendant with the consent of the plaintiff, to design the proposed new survey provided for in paragraph II-A of the proposed judgment and that he is the sole person capable of giving testimony as to its effectiveness.

Dated, August 25th, 1959.

Yours, etc.

Herbert Cheyette, Attorney for Sam Fox Publishing Company, Incorporated, Office & P. O. Address, 11 West 60th Street, New York, N. Y.

To:

William D. Kilgore Jr. Esq., Antitrust Division, Department of Justice, Washington, D. C.

Sullivan & Cromwell, Esqs., Attorneys for Defendants, 48 Wall Street, New York, N. Y.

[fol. 188].

Unitêd States District Court Southern District of New York Civil Action No. 13-95

UNITED STATES OF AMERICA, Plaintiff,

-against-

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., Defendants.

AFFIDAVIT

State of New York, County of New York, ss.:

Herbert Cheyette, being duly sworn, deposes and says:

He is the attorney for Sam Fox Publishing Company, Incorporated. Said company is a charter publisher member of ASCAP.

Pursuant to the order of this Court dated June 29th, 1959, there will be found attached hereto as Exhibit A, a notice by this publishing company, as a party with an interest affected by this proceeding, of its intention to appear be-

fore this Court on October 19th, 1959 to be heard why the proposed consent further amended Final Judgment will not

accomplish the antitrust purposes of this suit.

In or about the first week of July, 1959 deponent communicated with the office of the Hon. Sylvester J. Ryan by telephone. Deponent was informed by said Judge's law clerk that the Judge did not intend to confer with any party with "an interest affected by these proceedings" before the hearing to be held October 19th, 1959. Said clerk did in-[fol. 189] form deponent, however, that any question would be relayed to the Judge and an answer provided if required. Deponent thereupon informed the clerk that analysis of the proposed consent further amended Final Judgment revealed that without question it had been based upon data furnished by ASCAP to the Department of Justice, which data was solely within the knowledge of these two parties, and not available to any of ASCAP's members. Nevertheless the order of the Court dated June 29, 1959 provides:

"Ordered that any party or individual who has an interest affected by these proceedings may appear at such hearing and make application to be heard upon the ground that the proposed consent further amended Final Judgment will not accomplish the antitrust purpose of this suit."

Deponent therefore stated that it would be impossible for said other parties or individuals with an interest affected .by these proceedings to give this Court an informed opinion as to whether the proposed consent further amended Final Judgment will accomplish the antitrust purposes of this suit unless the facts furnished by ASCAP to the Department of Justice were made available for study prior to the hearing. In the absence of such information being placed on file in this court, as is the universal practice in proceedings judging the compromise of derivative stockholders' actions, to which the hearing on October 19th is. analogous, the order providing for the appearance of interested parties would be rendered nugatory, for interested parties, deprived of said information, would be required to analyze the proposed judgment without evidence, there being no record whatsoever. Deponent therefore requested

to know what proceedings might be instituted in order to obtain the information necessary to evaluate the proposed

[fol. 190] judgment.

Thereafter, some time later the same day, deponent was informed by said law clerk that his question had been communicated to the Judge and that deponent might be advised to request the desired information from the Justice Department by letter. Should that information be refused by the Department, deponent might then make a motion before this Court to compel answers to said interrogatories.

Pursuant to this suggestion, on July 14th, 1959 a registered letter, a copy of which is annexed hereto as Exhibit B, was sent to the Department of Justice. This letter contains an itemized request for answers to interrogatories, which interrogatories contain specific reference to the provisions of the proposed consent further amended Final Judgment to which they pertain.

As of the date of this affidavit, receipt of said letter has not been so much as acknowledged by the Department of Justice, though deponent has a post office certificate of its

deliveru.

On July 29th, 1959, before leaving on vacation, deponent, not having received any answer from the Department of Justice, telephoned to inquire what position the Department intended to take with respect to his request for information. Deponent was informed that his letter had been received and that the Department had agreed that deponent was entitled to all the information requested, which information, the Department stated, it had in its possession. Nevertheless, the Department added, it had to obtain ASCAP's consent to furnish it to deponent. Such a meeting was then [fol. 191] scheduled for the following week, but the Department was sure such information would be sent to deponent by August 7th:

Deponent returned from his vacation on August 17th to find that no such information had been forthcoming. On said date deponent again called the Department of Justice. This time deponent was told that his request had been communicated to ASCAP, without indication of its source, the first week in August and that ASCAP had in turn promised to supply the information to all interested parties, provid-

ing it could devise a means for doing so outside the court. ASCAP, the Department stated, had taken the position that it would not furnish any information before this Court by reason of the belief that such information could then be used as prima facie evidence in a private lawsuit for treble damages under the antitrust law. The Department further stated, that it had not heard from ASCAP again on the matter until that very morning, when it was informed that Mr. Arthur Dean would answer all of deponent's interrogatories in a speech to be delivered to the ASCAP west coast membership on August 18th, and to the Society's east coast membership on August 27th.

The Justice Department did not bother to inform deponent why it was necessary for ASCAP to furnish this information if the Department had it already, as the Depart-

ment had stated to deponent on July 29th, 1959.

On Friday, August 21st, the Department stated that it had no indication that deponent's request for information had been answered by ASCAP in any way whatsoever on [fol. 192] the West Coast or anywhere else. The Department further informed deponent on this date that it would finally acknowledge receipt of his original letter on July 14th, 1959 requesting the information and that it would not oppose any motion to have such requested information produced. Again the Department made no effort to inform deponent why, if it had the information, as it originally stated, and if it would not oppose a motion to have it produced, it nevertheless required a motion to be made, unless it feels that the position taken by ASCAP should be ruled upon by the Court.

Deponent respectfully wishes to state the dilatory tactics of ASCAP and the Department of Justice with respect to deponent's interrogatories have been both discourteous and farcical.

The proposed consent further amended Final Judgment is an extremely technical document dealing with a unique industry, of decisive importance to the economic well being of the members of ASCAP. Moreover this document will also be of decisive importance to the United States, for it will control, with respect to the matters to which it pertains, the government's future legal relationship to the Society. The explicit language of Rule 33 that "interroga-

tories shall be answered separately and fully in writing under oath" should not be flouted in a matter of such im-

portance.

Surely if the proposed judgment is equitable and if it accomplishes the purposes for which it is designed, the parties should welcome the opportunity to produce the data supporting its conclusions. Surely ASCAP should not be permitted to closet the information upon which its members [fel. 193] are invited by this Court to give their opinion, on the ground that such information might be useful to hypothetical litigants in possible future lawsuits. The proposed consent further amended Final Judgment requires the closest possible scrutiny, scrutiny based on all available information. Such information must include written answers to deponent's interrogatories, placed on file in this Court and available during regular court hours for inspection by all interested parties, for such information is available nowhere else.

The Department of Justice is the appropriate party to provide such answers. The state of its knowledge with respect to the data with which the proposed judgment purorts to deal is certainly as relevant to the efficacy of these rovisions as the data itself. The Department of Justice has ated to deponent that it has the information requested and added it is inconceivable to imagine otherwise. Neverthese should the Department be forced to admit in any infance that it does not possess the desired information, SCAP should be directed to produce it.

Four of the interrogatories (denoted by an asterisk) in e annexed notice of motion were not contained in deonent's original letter to the Department. Nevertheless, not the relevancy of these added questions cannot be disnoted and since neither of the parties has made any effort supply the heretofore requested information, no preju-

e can possibly result from their inclusion now.

Unless this Court compels the plaintiff to file written swers to deponent's interrogatories, there is absolutely record on which the proposed consent further an Aded of 194] Final Judgment may be evaluated by the parties individuals with an interest affected by these proceeders, either with respect to said judgment's equity or to its prose under the antitrust laws.

The proposed new sampling technique provided for in paragraph II-A of the proposed judgment is based on studies conducted by Joel Dean, a statistician hired by Sullivan & Cromwell, defendants' attorneys, with the acquiescence and approval of the plaintiff. Mr. Dean, the designer of this sampling technique, should be required to be available as a witness at the hearing of October 19th, 1959. Certainly his testimony will be the best evidence as to its scope, intent and accuracy.

Wherefore deponent respectfully requests that an order be granted directing the plaintiff to provide written answers to the interrogatories propounded in the annexed notice of motion and that said answers be placed on file in this court for inspection by all parties with an interest affected by these proceedings, and that the Court further direct that Mr. Joel Dean appear as a witness at the hearing scheduled for October 19th, 1959.

Herbert Cheyette

Sworn to before me this 25th day of August, 1959. Minna Witkoff, Notary Public, State of New York, No. 03-4316000, Qualified in Bronx County, Commission Expires March 30, 1961.

[fol. 195]

EXHIBIT A TO AFFIDAVIT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 13-95

UNITED STATES OF AMERICA,

Plaintiff,

-against-

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,

Defendants.

NOTICE OF APPEARANCE

Pursuant to the order of this court dated June 29th, 1959 SAM FOX PUBLISHING COMPANY, INCORPORATED, a charter

publisher member of ASCAP, hereby declares its intention to appear by Herbert Cheyette, its attorney, at the hearing to be held on the 19th day of October, 1959 in the above entitled action, at the United States Courthouse, Foley Square, in the Borough of Manhattan, City of New York, at which time it will make application to be heard as a party who has an interest affected by these proceedings, upon the ground that the proposed consent further amended Final Judgment will not accomplish the antitrust purpose of this suit.

Dated, August 25th, 1959.

Yours, etc.

HERBERT CHEYETTE

Attorney for Sam Fox Publishing
Company, Incorporated
Office & P. O. Address
11 West 60th Street,
New York, N. Y.

To:

WILLIAM D. KILGORE JR. Esq.

Antitrust Division

Department of Justice

Washington, D. C.

Sullivan & Cromwell, Esqs.,
Attorneys for Defendants
48 Wall Street
New York, N. Y.

EXHIBIT B TO AFFIDAVITA

July 14, 1959

Mr. Robert Bicks
Assistant Attorney General
Department of Justice
Washington, D. C.

Re: United States vs. ASCAP
Civil Action 13-95
United States District Court
Southern District of New York.

Dear Sir:

On behalf of the Sam Fox Publishing Company, Inc., a charter publisher member of the American Society of Composers, Authors and Publishers and a "party... who has an interest affected" by the proceedings in United States of America vs. American Society of Composers, Authors and Publishers, Civil Action 13-95, United States District Court, Southern District of New York, you are hereby requested to make available the following information with respect to the proposed order in the above entitled action so as to enable this party or any other party so interested to properly evaluate its terms. The purpose of this request is to enable this party or any other party to comply with the final paragraph of the order of the Honorable Sylvester J. Ryan, dated June 29, 1959, which reads as follows:

"Ordered that any party or individual who has an interest affected by these proceedings may appear at such hearing and make application to be heard upon the round that the proposed consent further amended Final Judgment will not accomplish the antitrust purpose of this suit."

INTERROGATORIES

- 1. With respect to provision III-E of the proposed order:
 - A. How many foreign societies furnish remittances of more than \$200,000.00 per year to ASCAP?
 - a. If any, name them.

- b. If any, state the number of years the remittances have been more than \$200,000.00.
- B. How many foreign societies make remittances to ASCAP!
- 2. With respect to provision IV-B of the proposed order:
 Using the last annual ASCAP remittances to publishers as a basis with respect to the proposed new publishers voting formula, state the following:
 - [fol. 197] a. The number of votes that will be cast by each of the publisher members and affiliated publishers now represented on the Society's Board of Directors? What percentage of the total possible vote will said Board of Directors and affiliated publishers control?
 - b. State the number of votes capable of being cast by the 50 publishers receiving the greatest distribution from the Society. Indicate which, if any, of these 50 publishers are affiliated with each other.
 - c. State the total number of publishers who will have one vote.
 - d. State the total number of votes capable of being cast.
 - e. Excluding the publishers represented on the Board of Directors and their affiliated companies what is the minimum number of publishers that will be capable of combining so as to constitute one-twelfth of the total possible vote.
- 3. With respect to provision IV-B of the proposed order:
 - a. State the number of years each of the publishers currently represented on the Board of Directors, has had a representative on the Board of Directors.

4. With respect to the proposed "Weighting Rules", Section 5-B"

Of the 377 works owned by publishers represented on the Society's Board of Directors being used as-themes and having accumulated 20,000 credits as of April 2, 1958, according to the ASCAP affidavit "A-14" in the appendix to the record of the Hearings before Sub-Committee No. 5 of the Select Committee on Small Business, House of Representatives, page 538, question 9, how many of these works accumulated their 20,000 credits in the two years first succeeding the first performance recorded in the ASCAP survey?

5. With respect to the proposed "Weighting Rules", Section 5-B:

For each year beginning January 1, 1943 state-

- a. The type of survey employed by ASCAP, if any.
- b. The media surveyed, if any.
- c. The type of sample, if any.
- d. The data taken, if any.
- e. Type of records kept and presently extant in the files of the Society.

[fol. 198] State generally the information and data shown in the above records with respect to each of the years in question.

6. With respect to the proposed "Weighting Rules", Section 5-B:

What is the first date on which ASCAP surveyed the following:

- a. Local radio stations.
- b. Network radio stations.
- c. Local TV stations.
- d. Network TV stations.
- e. What is the date on which a procedure was first instituted whereby reference tapes were taken on a continuing basis of performance in each of the above?

- f. What is the date on which an objective sample was first instituted by the Society?
- g. With respect to the media mentioned above, what is the date on which types of uses were first indicated in the ASCAP survey?
 - h. With respect to the media mentioned above, what is the date on which duration of performance was first indicated?
 - i. What is the significance of the dates January 1, 1943? October 1, 1955?
- 7. With respect to the proposed "Weighting Formula" provision F:

What percent of the uses in the following media are "live" and what percent "recorded", according to the current ASCAP survey!

- a. Radio network.
- b. Local radio.
- c. TV network.
- d. TV local.

with respect to the above interrogatories, it is not necessary to mention any publisher by name.

The Department, in the light of the recommendations of the House Judiciary Committee, and in the spirit of equity [fol. 199] and fair play, has requested the court to allow all parties affected by the proposed decree to apply to be heard with respect to its provisions. We are sure, therefore, that the Department will be only too glad to answer the above questions so as to enable parties requesting leave to be heard to present an informed opinion.

Your prompt answers to the above questions will be appreciated by all members of the Society.

Sincerely yours,

SAM FOX PUBLISHING COMPANY, Inc.

By:

Herbert Cheyette

· [fol. 200]

United States District Court Southern District of New York

UNITED STATES OF AMERICA,

Plaintiff,

-against-

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,

Defendant.

STATE OF NEW YORK COUNTY OF NEW YORK, SS.:

HERBERT CHEYETTE, being duly sworn, deposes and says:

That he is the attorney for Sam Fox Publishing Company, Incorporated. That on the 25th day of August, 1959 he served the within Affidavit and Notice of Motion upon William D. Kilgore Jr., Esq., the attorney for the above named plaintiff by depositing a true copy of the same securely enclosed in a post-paid wrapper in a Post Office Box regularly maintained by the United States Government at 11 Park Place, in the County of New York, directed to said attorney for the plaintiff at the Antitrust Division, Department of Justice, Washington, D.C., that being the address designated by him for that purpose, or the place where he then kept an office, between which places there then was and now is a regular communication by mail.

/s/ HERBERT CHEYETTE

Sworn to before me this 25th day of August, 1959.

/s/ MINNA WITKOFF
MINNA WITKOFF, Notary Public
State of New York, No. 03-4316000
Qualified in Bronx County
Commission Expires March 30, 1961

[fol. 201]

ENDORSEMENTS

The information sought having been given to applicant, voluntarily, this motion is withdrawn, without any determination by the Court of the applicant's status to make any application, herein so ordered.

Sept. 8, 1959.

/s/ Sylvester J. Ryan U.S.D.J.

(Stamp)

COPY RECEIVED U. S. ATTORNEY S. D. N. Y.

AUG 27 1959

By /s/ RICHARD B. O'DONNELL /s/ JBH Attorney Dept. of Justice Anti-Trust Div.

(Stamp)

COPY RECEIVED

AUG 27 1959 Sullivan & Cromwell Attorneys for ASCAP

SEP 1 1959

Motion respectfully referred to Chief Judge Ryan at the request of Counsel.

/s/, E. J. DIMOCK U.S.D.J.

Sept 2—

C

Adj. at request of Government to Sept. 8th, 1959 at 2:30 p.m.

/s/ Sylvester J. Ryan U.S.D.J.

[fol. 202]

[File endorsement omitted]

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MEMORANDUM IN SUPPORT OF PROPOSED CONSENT FURTHER AMENDED FINAL JUDGMENT AND ENDORSEMENT THEREON—Filed September 2, 1959

A Final Judgment was entered in this case on March 4, 1941 and an Amended Final Judgment was entered on March 14, 1950. In 1956, as a result of complaints received from various members, the Government instituted an investigation of the internal operations of the defendant (hereinafter referred to as ASCAP) under the 1950 Judgment. That investigation disclosed that in at least six aspects the Judgment required more specific directives by the Court if the antitrust purpose of the Government's suit were to be achieved. ASCAP was given the opportunity to negotiate a proposed further amendment of the 1950 Judgment covering those areas which the Government deemed required correction. As a result of these negotiations a proposed further amended Final Judgment (herein referred to as the proposed Order) has been agreed to by the parties, and submitted to the Court for approval.

The purpose of this memorandum is to explain the six aspects of ASCAP's operations which are affected by the proposed Order and to explain the way in which that Order deals with each of those operations so as to carry out the antitrust purpose of this suit. These six aspects discussed

in this memorandum involve:

I. The right of ASCAP members to withdraw from ASCAP;

- II. The requirement that ASCAP scientifically conduct a survey of the performances of the compositions of its members as a basis upon which to make distribution of its revenues to its members;
- III. The manner in which ASCAP shall make distribution of such revenues to its members;

- [fol. 203] IV. The limitation on the extent to which ASCAP may weight the votes of its members;
 - V. The manner in which ASCAP shall assure its members of equal treatment and an adequate opportunity to protect their rights within ASCAP; and
- VI. The obligation upon ASCAP to admit all duly qualified applicants to membership.
 - I. The Right of ASCAP Members to Withdraw
 From ASCAP
 (Cf. Section I of Proposed Order)

Existing Practice

Government's investigation has disclosed that ASCAP's present rules make it economically unfeasible for a member to enjoy the right assured him under the 1950 Judgment to withdraw from the Society. These rules provide that as to revenue from existing licenses, a former member who has resigned shall not receive an credit for the performances of his songs, which are licensed by ASCAP, insofar as half of the amount apportioned to writer distribution is concerned and insofar as 45 per cent of the amount apportioned to publisher distribution is concerned. As to future licenses, the resigning member receives nothing even though ASCAP will continue to license his songs if his co-writer or publisher is a member of ASCAP. By thus depriving a member who withdraws from ASCAP of much of the value of his existing catalogue, ASCAP effectively denies him his right to withdraw. Thus ASCAP is restraining the potential competition which a resigned member could offer by licensing his future works through another licensing organization. Since ASCAP usually continues to license the ex-member's catalogue by virtue of the continued membership of the publisher or of a co-writer, the ex-member should receive from ASCAP the same distribution for such songs as does a member.

Proposed Order

Section I of the proposed Order meets this problem by permitting a resigning member to leave his works in the

ASCAP repertory and to be paid for performances if ASCAP continues to license them by reason of the membership of a co-writer or publisher of the composition. This is [fol. 204] also intended to avoid legal uncertainties which make doubtful the right of a resigning member to license his works so long as an author, co-author, or publisher of the works continues as an ASCAP member. Thus Section I requires full payment under the ASCAP rules to the resigning member for his works remaining in the ASCAP repertory while permitting him to license his future works to another licensing organization.

II. The Requirement That ASCAP Scientifically Conduct a Survey of the Performances of the Compositions of Its Members as a Basis Upon Which to Make Distribution to Its Members.

(Cf. Section II(A), (B) and (C) of Proposed Order)

Existing Practice

Our investigation discloses that ASCAP does not conduct "objective surveys" as a basis upon which to make distribution of its revenues to its members. The Government believes Section XI of the 1950 Judgment contemplates a survey which is at least adequate to give a representative sampling of the performances of the works of ASCAP's members. We conclude that the ASCAP survey has not reached that goal. Surveying by the use of the sampling technique has universally recognized basic principles. The ASCAP survey does not employ the most elementary of these principles—"randomness".

ASCAP's survey puts a premium on network broadcasting performances. It does not adequately take into account thousands of performances occurring daily over local radio and television stations or performances occurring in other media. ASCAP logs each commercial "network" performance and multiplies it by the number of affiliated stations carrying the program. In contrast, ASCAP in its so-called "local survey," logs less than one-fourth of one percent of the total hours of local broadcasting throughout the country. Yet every local radio performance of an ASCAP song

receives a multiplier of only 20, and every local television

performance a multiplier of only 60.

The license fees received from radio and television net[fol. 205] works account for only one-fourth of ASCAP's
domestic revenue, but ASCAP distributes almost two-thirds
of its income on the basis of network performances. Again
in contrast, ASCAP distributes only one-third of its revenue on the basis of local radio and television performances
although three-fifths of the Society's domestic income is
derived from such sources. Further, \$1.26\$ per cent of
ASCAP's domestic revenue is received from other media,
such as bars, grills, taverns, restaurants, night clubs, skating rinks, etc., but no distribution whatsoever is made on
the basis of performance occurring in such media.

In addition, ASCAP's local survey is inaccurate and inefficient. This survey samples each day by the use of tape recorders, 32 radio stations and 22 television stations for a three-hour period per station. ASCAP samples from the same 22 metropolitan areas each day and additionally employs approximately 14 roving monitors who sample other areas. The tapes are then sent to the ASCAP office in New York where they are played by a group of employees having no special musical qualifications, who attempt to identify

the songs and thus make a record of performances.

Moreover, this survey is not conducted in such a way as to include anything like a "representative" sample of the performances occurring on non-network programs and other media such as wired music, hotels, night clubs and the like. Thus the survey samples no more than one song out of every 500 performed throughout the country on local radio and television stations, but ASCAP applies a multiplier of only 20 to each song thus sampled.

Perhaps relevant here is a comparison made by the plaintiff of surveys of ASCAP and Broadcast Music, Inc. (hereinafter referred to as BMI) for the months of July, August and September of 1956. The comparison indicates (1) that ASCAP's survey only covered approximately 21 per cent of the total hours of local broadcasting during the three-month period, and that BMI's survey covered approximately 2.63 per cent; (2) that ASCAP's survey caught performances of approximately 25,000 different song titles, whereas BMI's survey caught performances of approximately

To meet this problem the Department of Justice, was initially presented with a proposed survey plan developed by an organization, Joel Dean Associates. This plan was at our request reviewed by personnel of the Bureau of the Census, recognized experts in the field of scientific surveying. Section II (A) and (B) of the proposed Order, as well as the final plan formulated by Joel Dean Associates, takes into account the views of the representatives of the Bureau of the Census. As a result the proposed Order requires ASCAP to conduct a census or scientific sample in accord with generally accepted principles of ampling.

The plan as finally fermulated provides: (1) the samples must be randomly selected and proper blow-up multipliers must be employed to correctly reflect the estimated number of performances, and (2) ASCAP must use economic multipliers to reflect the dollar revenue to ASCAP from various groups of licenses surveyed. Within certain limitations and where feasible, a complete survey of all performances over a particular medium will be made. Thus ASCAP will continue its complete survey of performances on the major radio and television network commercial programs, but such performances will be subject to economic multipliers to reflect the dollar revenue to ASCAP attributable to the performances on this medium. Radio network sustaining programs, not being subject to complete survey as to the number of affiliated stations carrying each such program, will be logged with and treated as locally originated pro-

The plaintiff does not contend that the BMI survey is the only, or even the best, way to conduct a survey of performances. The plaintiff does not even suggest that the BMI survey is a correct survey. But the comparison of the two surveys does indicate clearly that ASCAP's present survey is woefully inadequate.

^{100,000} different song titles; that BMI's survey caught performances of approximately 20,982 different BMI song titles, whereas ASCAP's survey caught performances of only 5,026 non-ASCAP song titles. The ASCAP survey failed, then, to catch performances of more than 15,000 BMI songs, i.e., more than half of all the song titles caught on the ASCAP survey. The conclusion seems reasonable, therefore, that it likewise failed to catch performances of many ASCAP songs.

[fol. 207] grams. The plan which has been developed by Joel Dean Associates is expected to be put into operation about January 1, 1960. This survey plan calls for a 50 per cent increase in the size of the local radio samples. More importantly, however, it makes provision for scientific random selection of the stations to be sampled, and insures good geographical distribution of those stations. Provisions have been inserted in the Order designed to increase the accuracy of performance identification and, in addition, an experimental survey of performances in night clubs, dance halls and on wired music systems will be instituted. Extensive high speed electronic computing equipment is being installed by ASCAP to handle the complex calculations which are inherent in the operation of the system.

In response to the advice of the experts from the Bureau of the Census, the Government insisted upon, and ASCAP agreed, that Section II (B) of the proposed Order provide that after eighteen months plaintiff may seek additional relief in respect to the survey, including the scope, size or accuracy of the survey. Those experts advised that the adequateness of any survey plan, even though couched in technically accurate terms, depends upon how the plan is actually placed into operation, and how data produced from the survey is used to test the scope, size and accuracy of the survey. Accordingly, it was agreed that Section II (C) as well as II (B) be in the Order. Thus, under the proposed Order the Court, and the plaintiff and ASCAP as well, will [fol. 208] have the benefit of an independent expert to ad-

² This will meet a particular problem raised pertaining to ASCAP's survey when, in 1956, two ASCAP publisher members, Gem Music Publishing Corporation and Denton and Haskins Music Publishing Corporation, attempted to intervene in this action, charging that the Society's arbitrary reduction of credits for performances on radio network sustaining programs from 44 credits to writer members and 22 credits to publisher members to 3 credits was a violation of Section XI of the 1950 Judgment. In opposing this attempt to intervene, the plaintiff assured the Court that it was looking into the situation and committed itself, if it discovered that the Judgment was not being complied with, to report that conclusion to the Court and see that ASCAP adhered to the Judgment.

vise as to how the skeleton plan is fleshed out and operated. The Department has been assured that it will continue to have the informal advice of the Bureau of the Census as to any questions which may arise in the period when the survey plan is being placed in operation and being tested according

to recognized procedures.

The ASCAP survey under the proposed Order will treat radio network staining programs on the same basic as local commercial programs. They will be logged in the local sample, not from the network, and will be given the same blow-up and economic multipliers as are local commercial programs. It is felt that this method gives as accurate an estimate as is obtainable of the number of local stations carrying such programs and the economic value of those stations to ASCAP.

Because of their importance to the cultural life of the nation and because of ASCAP's assurance that the membership by and large feels that such works are entitled to preferred treatment, special treatment is authorized for radio network sustaining programs carrying symphonic, concert and chamber music performances (see subsection (E) of attachment C of the proposed Order).

III. The Manner in Which ASCAP Shall Make Distribution of Its Revenues to Its Members.

(Cf. Section III of Proposed Order)

Since ASCAP's members are competitors and the Society's manner of making distribution of its revenues to them vitally affects their ability to compete with each other, a description of the situation which the proposed Order seeks to change is desirable. A rather full description of the Society's existing practice is also desirable inasmuch as some of the alternative methods of distribution permitted by the proposed Order find their roots in the historical development of the Society's existing practice.

Distribution to Writers and distribution to Publishers is [fol. 209] considered separately for, after deducting expenses, half of the revenue of ASCAP is distributed among the publisher members and half is distributed among the

authors and composers.

Existing Practice

Our investigation disclosed that prior to the entry of the 1950 Judgment, ASCAP's distribution was made on the basis of a subjective evaluation of the worth of the catalogue of each member in the opinion of the Society's Classification Committees as follows:

Distribution to authors and composers was on the basis of the value of the member's contribution to the Society's repertory in the opinion of the Writer's Classification Committee. For this purpose, all members were classified into nineteen classes, six of which were "fixed classes," and thirteen of which were "fluctuating classes." The "fixed classes" received stipulated amounts each year regardless of the Society's income, whereas the income of the "fluctuating classes" varied depending on the Society's income.

Distribution to publisher members was made solely upon a subjective basis until approximately 1936. Thereafter distribution was made in part on the basis of performances of the members' songs as shown by the logs of the four national radio broadcasting companies on the following basis: (1) 55 per cent of the publishers' share of ASCAP's revenue was distributed on the basis of current performances as shown by the logs of the network; (2) 30 per cent of the publishers' share was distributed on the basis of "availability," i.e., the evaluation of the worth of each publisher member's catalogue in the opinion of the Publisher's Classification Committee; (3) 15 per cent was distributed on the basis of "seniority," i.e., the average number of performances for the preceding five years multiplied by the number of quarters of the publisher's ASCAP membership.

[fol. 210] (A) Writer Distribution (Cf. Section III (A) and (B) of Proposed Order)

After the entry of the 1950 Judgment, ASCAP provided that distribution should be on the following basis:

- (A) 20 per cent for current performance;
- (B) 60 per cent for sustained performance;
- (C) 20 per cent for accumulated earnings.

- (A) The 20 per cent distribution to authors and composers on the basis of "current performance" followed the method used by the publishers for their distribution on the basis of current performance.
- (B) The 60 percent distribution for so-called "sustained 'performance", in effect carried over the prejudgment subjective system of classification as follows: Each of the prejudgment alphabetical classes was assigned a number corresponding with the alphabetical designations, with the AA class being given the number 1,000, etc. The average number of "performance credits" for the years 1945 through 1949 for the members of each class was calculated in order to give the "class average." This computation disclosed that the five-year average of the members' actual "performance credits" bore but little relation to their subjective classifications. ASCAP thereupon established the rule for the 1950 distribution that when a member's "performance credits" in 1950 were such as to bring his five-year average below this "class average," he could be demoted, but only to a very limited extent (regardless of how low his average had dropped), and conversely, if his "performance credits" were such as to raise his average above his "class average" he could be promoted but only to a very limited extent regardless of how high his average had increased. Since each writer's original rating was based on the "subjective" rating given to him prior to the entry of the 1950 Judgment, it is apparent that the system adopted in 1950 did little but perpetuate the original ratings, which the Government believes is contrary to Section XI of the 1950 Judgment.

In 1952 the Writers' Classification Committee divided the [fol. 211] so-called "sustained performance fund" into two funds (each fund being used for the distribution of 30 persocent of the writers' share of ASCAP revenue), one of which continued to be known as the "sustained performance fund" and the other of which was designated the "availability

fund."

(1) Distribution of the "sustained performance fund" since 1952 has been based on the members' 1952 classification in the fund as modified by their later record of performance credits subject to "brakes" imposed on promotions

and demotions in the fund. Limited promotions and demotions have been permitted based upon the use of three concepts: "individual average," "actual class average" and "adjusted class average." A member's "individual average" is the average of his "performance credits" for the preceding five years or, at his option, ten years. The "actual class average" is the actual average of the "individual averages" of the members within any class. The "adjusted class average" is the hypothetical number of performances of each member in each class based on the assumption that each member is in his proper class on the basis of his performance credits (while the facts were not in accord with this basic assumption, the "adjusted class average" was a useful concept in showing the performance credits needed per classification point).³

A members' promotion or demotion in the "sustained performance fund" was based on the use of the above three [fol. 212] concepts as follows: It was provided that a member should be promoted only if his "individual average" was higher than either the "actual class average" or the "adjusted class average" of the class above him, and the extent of promotion was limited—if a member's current classification was above 500 he could rise a maximum of 250 points per year; if his current classification was below 500 he could rise no more than 125 points per year, plus one-half of the number of points to which he would other-

³ To calculate the "adjusted class average," ASCAP first calculated the total number of so-called "classification points," as follows: The classifications, as heretofore noted, ranged from 1 to 1,000 and each member was assigned the number of "classification points" corresponding to his classification. For example, if there were four members in the 100-point classification, this gave a total of 400 "classification points"; three members in the 50-point classification gave a total of 150 "classification points," etc. After totalling the "classification points" of all members, the "individual averages" of performance credits of all members were then totalled. Dividing the total number of "classification points" into the total number of "performance credits" gave the number of performance credits needed per classification point. In 1957 this gave a figure of 41, so that to be in class 100 it was theoretically necessary to have an "individual average" of 4100 performance credits.

wise be entitled, but in any event not to exceed 250 poi its in any one year.

To be demoted, it was provided that a writer must meet both of the following requirements: His "individual average" must fall below both the "adjusted" and the "actual" averages of the class below him. He would, however, not be demoted if his "individual average" was above the "actual 'average" of his class and also above the lowest "individual average" of any member of the class above him, excluding those members who had fallen the maximum amount. His fall was further limited as follows: If his classification was above 500, he could not fall more than 100 points per year; if his classification was between 500 and 250, he could not fall more than 50 points per year; if it was between 250 and 100, he could not fall more than 25 points per year; if it was between 100 and 50, he could not fall more than 10 points per year; if it was under 50, he could not fall more than 5 points per year. Under these rules it would require 31 years for a writer's classification (insofar as distribution in this fund is concerned) to fall from 1,000 to zero. falling at the maximum rate.

The above rules governing distribution of the "sustained performance fund" permitted frequent situations in which a member's "individual average" would entitle him to a much higher or lower classification, but because of the limitations on promotions and demotions he could not be promoted or demoted. Demotions were very greatly retarded by these rules. Members in high classification, but having low "individual averages," have received large pay-[fol. 213] ments from the fund at the expense of members having lower classifications, but, in many cases, a great many more performances. In short, the above rules, in our opinion, have had the effect of prolonging the pre-judgment subjective method of distribution contrary to Section XI of the 1950 Judgment.

(2) The "availability fund" was established by the Society to "freeze" the distribution of 30 per cent of the writers' share of ASCAP's revenue in accordance with the pre-judgment "subjective" system of distribution, also, in our opinion, contrary to Section XI of the 1950 Judgment.

To this end, it was provided that each member's classification, for purposes of his participation in the "availability fund", was to be the saine as his classification in the "sustained performance fund" as of July 1952 and, regardless of how poor his record of performances thereafter, no member could be demoted until July, 1956; after 1956 demotions are possible only once in every five years, and the fall is limited so that a member with a classification above 750 cannot drop below 750. Similar floors were established at 500, 375, 250, 175, 125, 75 and 50. Under this provision, a writer with a classification of 775, for example, would require 45 years, falling at the maximum rate, to drop to zero.

Promotions in "availability" rating are possible but difficult. The promotion must first be earned in the "sustained performance" rating and the full promotion is not given to the "availability" rating unless it is sustained for a three-year period. Only 40 per cent of any increase in "sustained performance" classification is given to the author's "availability rating" the first year. If the increase is maintained for a second year, 30 per cent of the increase is added to the "availability" classification; and only if the increase is maintained for a third year is the final 30 per cent added to

the "availability" rating.

(C) The writers' "accumulated earnings fund" distrib-[fol. 214] utes 20 per cent of the writers' share of ASCAP's revenue. This distribution is made by taking the five-year average of the writer's point rating in the "sustained performance" and "availability" funds and multiplying it by the number of quarters of the writer's membership in ASCAP. The totals for all members are added together and divided into the fund to be distributed in order to calculate the dollar value of one point in this fund. A member with 40 years of membership will receive four times as much from this fund as a member with only ten years. of ASCAP membership, although each has the same sustained performance and availability ratings over the past five years. In practice, it is impossible for a writer with only ten years' membership to have a high five-year average of "availability" and "sustained performance" ratings because of the limitations on promotion in those funds. Because of the use of the "sustained performance" and "availability" funds, distribution for 1958 from the "accumulated earnings fund" may be partially based on performance credits going as far back as 1942. The fund is objectionable, in this suit, for the further reason that instead of basing distribution primarily on performances it provides for distribution based primarily on length of membership and membership, prior to the entry of the Judgment, was granted or withheld at the absolute discretion of the Board of Directors.

Proposed Order

Section III (A) of the proposed Order seeks to meet our objections to ASCAP's present method of making distribution to its writer members by establishing two alternative systems under which writers may elect to receive distribution.

Under one alternative a writer may elect to receive distribution solely upon the basis of his current performance credits as shown by the performances recorded during the preceding fiscal survey year beginning with the fiscal survey year starting January 1, 1960. He may exercise the option to receive payment in this manner at the beginning [fol. 215] of any fiscal survey year. The first time he exercises the option it will be binding for two years. Should he thereafter, however, elect to receive distribution according to the second alternative (set forth below) and within five years thereafter wish to again change to the current performance option, his election will be binding for a period of five years.

Under the other alternative, a writer may elect to receive distribution according to a plan which revises ASCAP's present system of distribution. Twenty per cent of the amount distributed to writers electing this plan will be distributed on the basis of current performances. Thirty per cent of the money distributed to the writers electing this plan will be distributed on the basis of a five year average of their performance credits. Thirty per cent will be distributed on the basis of a five-year average of their performances of "recognized works". "Recognized works" are

those compositions which have received performance credits in the ASCAP survey at least four quarters prior to the performance in question. The remaining 20 per cent will be distributed on the basis of the writer's length of membership in ASCAP or so-called membership continuity, with the proviso that no writer will be credited with more than 42 years' membership. The sharp brakes which exist on promotion and demotion in somewhat similar funds now employed by ASCAP will no longer be permitted. ASCAP may limit for one year the rise in a member's rating in the "average performance" and "recognized works" funds and it may limit the fall in his rating in these funds for no more than two years.

In addition to the defects heretofore mentioned, ASCAP's present system of writer distribution compels the top writer members, commonly referred to by the Society/as the "superdreadnaughts", to share a large part of their earnings with their less successful competitors. This has been accomplished by enacting separate rules in regard to them. [fol. 216] These rules require these writers to have more performances per classification point, and more performances than their competitors in lower classifications, in order to earn a comparable increase in rating in the funds.

Section III (B) of the proposed Order continues to permit ASCAP to treat the top writers differently than other members, but on the condition that such writers are given the opportunity to freely vote their approval or disapproval of such treatment. This exception was made at the request of ASCAP and upon the representation by ASCAP that these writers with a large number of performances would voluntarily forego a substantial portion of the money otherwise due them in order to increase the amount available for distribution to less successful members. Under Section III

^{&#}x27;If the 100 members with the highest five year averages vote to approve a rule withholding the current performance option from themselves, they will thereby be giving up an estimated \$2,000,000 per year, and that money to which they would otherwise be entitled will be distributed under this plan. Those members selecting payment on a strictly current performance basis will not share in the amount which these top writers propose to give up.

(B) the 100 top writers (in terms of their five year averages of performance credits) acting as a group may, by a majority vote, counted on both a per capita and performance basis, approve a rule by ASCAP denying them the option

to receive payment on a per performance basis.

The Government, in order to have some safeguard as to the will of these top 100 writers with respect to this rule, insisted upon and ASCAP agreed, that the terms of Section III (B) require that at any time after three years from the entry of the Order, upon the request of (1) the Government; (2) 25% of the affected writer members; or (3) writer members having 25% of the performance credits in the latest available five preceding fiscal survey years out of the total [fol. 217] number of such credits of all the affected members, a new vote shall be had to determine whether the rule should continue in effect.

(B) Publisher Distribution (Cf. Section III (C) and (D) of Proposed Order)

Existing Practice

After 1950, ASCAP continued to distribute 55 per cent of the publisher's share of ASCAP's revenue on the basis of "current performances". The 30 per cent distribution for "availability" was put on an objective basis as follows: The average number of performances of each publisher's catalogue for the preceding five years was computed to give a numerical basis for the publisher's "availability" rating. However, in contrast to the terms of Section XI of the 1950 Judgment, it is significant to note that in making this computation it was provided that no performances of/a song would be considered unless and until the song had achieved a record of performances covering at least a two year period. This proviso has had the effect of continually eliminating for at least a two year period the competition of new songs insofar as 30 per cent of the publisher's distribution is concerned. It has also unfairly enhanced the amount received each year for the performance of songs which have achieved a record of performances covering a two year period. The difficulty with this situation is two-fold: (a) it benefits certain members at the expense of their less fortunate competitors and (b) it excludes new songs from consideration in the distribution from this fund. Since a new publisher must rely upon new songs, the rule particularly

places him at a competitive disadvantage.

The remaining 15 per cent distribution for "seniority" was not changed and the effect of this provision has been to give the older established publisher members a larger payment per performance of each song at the expense of the publishers who have had a shorter period of membership in the Society, putting them at a competitive disadvantage.

[fol. 218] Proposed Order

Section III (C) and (D) of the proposed Order attempts to meet the Government's objections to ASCAP's present method of making distribution to its publisher members by establishing two alternative systems under which publishers may elect to receive distribution. Under one alternative, a publisher may elect to receive distribution solely on the basis of his current performance credits as shown by the performances recorded during the preceding fiscal survey year beginning with the fiscal survey year starting January 1, 1960. However, to prevent inequities a change-over period is permitted as follows: For performances recorded during the fiscal survey year commencing January 1960, publishers electing this option will receive but 75 per cent of the distribution to which they would be entitled if all publisher distribution during the same period were on a current performance basis.5 This percentage will increase 5 per cent per year until in 1965 publishers choosing this system of distribution will receive 100 per cent of the distribution to which they would be entitled if all publisher distribution were on a current performance basis. A publisher may exercise the option to go on a current performance basis at the beginning of any survey year, but, once exercised, the option may not be revoked.

Under the second alternative, a publisher may elect to receive distribution according to a system somewhat simi-

It is recognized that initially perhaps only those publishers relying primarily on current hits will find this option attractive.

lar to that now used by ASCAP. Under this system, 55 per cent of the publishers' share of the ASCAP income (after deducting the distribution made to the publishers electing the current performance option) will be distributed on the basis of current performances as shown by the latest fiscal survey year commencing with the survey year [fol. 219] starting January 1, 1960. This will gradually increase until in 1965 70 per cent will be so distributed. Thirty per cent will be distributed to the members selecting this system on the basis of performances of "recognized works" during the preceding fiscal survey year. Fifteen per cent will be distributed on the basis of a publisher's seniority, i.e., number of quarters of membership multiplied by his current performance credits. The percentage so distributed will gradually decrease until in 1965 the seniority distribution will end altogether.

In summary, the over-all effect of ASCAP's existing distribution system is that more than 80 per cent of all monies distributed to author and composer members, and more than 45 per cent of all monies distributed to publisher members, are now distributed on a basis which does not give primary consideration to performances as contemplated by Section XI of the 1950 Judgment. The system further perpetuates the Society's pre-judgment subjective system of classification. Instead of making distribution to its members on a basis which gives primary consideration to performances, under ASCAP's present system some writers initially receive as little as 13 cents per performance and others as much as \$25 per performance.

The proposed Order, in contrast, establishes a system under which all writer and publisher members can, before January 1960, elect to receive payment on a per performance basis. The proposed Order, however, provides for alternative methods of payment for those members who do not wish to risk the vicissitudes inherent in per performance distribution. Thus, we seek to assure the maximum feasible area of individual choice.

[&]quot;Recognized works" are compositions which have received performance credits in the ASCAP survey at least four quarters prior to the performance in question.

(C) ASCAP's Distribution of Foreign Revenue (Cf. Section III (E) of Proposed Order)

[fol. 220] Existing Practice

ASCAP has followed what the Government believes is an unfair method of distribution of revenue received from affiliated foreign performance rights societies. ASCAP receives about \$2,000,000 per year from foreign societies for the foreign performing rights on ASCAP licensed compositions. Although the compositions of some of its members have large performances predominantly in foreign countries such as Germany and Austria, ASCAP distributes all foreign royalties solely on the basis of performance reports of English, Swedish and Canddian societies. Under ASCAP's system of distribution of foreign royalties, publisher members whose works are not performed in England, Sweden or Canada receive no payments from ASCAP for other foreign performances despite the fact that their works may bave been performed extensively in other foreign countries and ASCAP may have received payments from such other foreign countries based on the performance of such works.

Proposed Order

Section III (E) of the proposed Order attempts to meet this problem, while at the same time taking into consideration the administrative problems involved, by directing ASCAP to make distribution of foreign royalties on the basis of reports from the country from which the royalties came if these royalties exceed \$200,000 per year and if the reports are readily usable by ASCAP.

(D) ASCAP's Weighting Rules (Cf. Section III (F) of Proposed Order)

Existing Practice

In its distribution to both writers and publishers; ASCAP has followed the practice of awarding partial credits for performance of certain songs when used as themes, jingles, cues and background as opposed to so-called feature per-

formances. The respective Publisher and Writer Classification Committees have the authority to establish and modify. [fol. 221] these rules at their discretion without approval or ratification by the members. The rules are frequently applied so as not to give primary consideration to performances. Under ASCAP's existing rules governing the award of credit for performances of songs used as themes, background uses and jingles, the credit awarded per performance is in general based on the song's total record of performance credits in the Society's survey and the distinction between the amount of credits awarded to songs used for similar purposes may be as great as 1,000 to one. During 1957, 19.69 per cent of all ASCAP performance credits were awarded for background uses, 9.61 per cent for use. as theme songs and 1.90 per cent for use as jingles—over \$6,000,000 per year is distributed for performances of theme songs, and background music. Thus the extreme importance of these rules in the competitive struggle among ASCAP members cannot be over-emphasized.

Such rules put certain members of the Society at a tremendous competitive disadvantage. ASCAP has supplied a list of twelve compositions which have together earned a total of more than 650,000 performance credits as background music and theme songs during the single year 1958. These twelve songs earned more credit than did the entire catalogue of Irving Berlin or Oscar Hammerstein.7 Only one of these songs had more than 40 feature performance. credits, and together they had only 814 feature performance credits. While the amount of credits to be awarded for various kinds of performances may properly be a matter for the business judgment of the ASCAP Board of Directors, the Government took the position that it is not consonant with the antitrust purpose of this suit as embodied [fol. 222] in Section XI of the 1950 Judgment, to allow discrimination of as much as 1,000 to one among songs simi-

The songs are: Simple Melody, American Beauty March, Concert for Toy Piano, I Never Heard You Say, Let's Control Together, Listen to the Green, Open the Day With a Smile, Little Darling, Little White House, Breakfast Club Makes Life, etc., Good Morning Breakfast Clubbers, and So Long You Breakfast Clubbers.

larly used but awarded different credit for such performances.

Proposed Order

Section III (F) and "Attachment C" of the proposed Order attempt to meet this problem by giving ASCAP the right to continue to make distinctions among compositions similarly used as background music and theme songs, but requiring that the distinction be based on objective records of feature performances indicative of the song's current value to the ASCAP repertory and putting a strict limitation on the extent of the discrimination. For use as a theme song these distinctions may not exceed a ratio of 10 to one and for use as background music they may not exceed a ratio of five to one, between songs receiving full credit on the one hand and on the other hand those which have merely been commercially published, commercially recorded and logged five times in the local radio survey of ASCAP performances. These qualifications of publication, recording and a minimum number of performances are designed to distinguish between songs written for general use and currently being performed as feature works and those written expressly as background for specific dramatic shows. This latter type of composition is treated on a durational basis and awarded no less than 5 per cent credit for each 45 seconds of performance time.

An important innovation is the rule that all distinctions must be based on the song's record of "feature performances" as contrasted with the present system in which performances as background music or as a theme may help a song build up required credit to earn higher payments. To qualify for full credit a song in the future will have to have a record of 20,000 feature performance credits plus a record of 2,500 feature performance credits during the preceding [fol. 223] five years. No more than 750 credits can be earned towards this 2,500 figure in any one year. The purpose of these rules is to provide a stringent but fair test under which only truly outstanding songs can obtain full credit when used as background music or as theme songs, while at the same time preventing undue discrimination against competitive songs used for a similar purpose.

(F) ASCAP's Distribution of Revenues From Arrangements of Public Domain Compositions (Cf. Section III (G) of Proposed Order)

Existing Practice

ASCAP's present writer distribution system providing for distribution from the so-called "sustained performance fund" and "Availability fund" and putting stringent "brakes" upon the extent to which a member could be demoted in his rating or classification in such funds could be construed as permitting distribution to a member from those funds long after all of his copyrights had expired. ASCAP denies that any such distribution has in fact been made to a member after the expiration of a member's copyright.

Proposed Order

Section III (G) of the proposed Order sets the matter at rest by ordering that ASCAP shall grant no performance credits to any member for performances of any composition occurring after the composition is in the public domain. This does not, of course, prevent the Society from making proper distribution to holders of copyrighted arrangements of public domain works for the performance of such copyrighted arrangements.

IV. The Limitation on the Extent to Which ASCAP May Weight the Votes of Its Members (Cf. Section IV (A) through (F) of Proposed Order)

One of the antitrust objects of this suit, as expressed in Section XIII of the 1950 Judgment is to "insure a democratic administration of the affairs of ASCAP..." ASCAP [fol. 224] exists because no individual writer or publisher is large enough to be able to grant licenses to the thousands of commercial music users throughout the country and then enforce such licenses. ASCAP's fundamental purpose is to license the works of all of its members and to distribute to the members the revenue obtained thereby. The economic life of the members of ASCAP is dependent on ASCAP's performance of these two duties. Since ASCAP's members are in competition with each other, it was one of the anti-

trust purposes of this suit to make it impossible for certain members to use the Society to obtain an unfair advantage over their competitors.

Existing Practice

ASCAP's present rules frustrate this express purpose in that they give complete control over all the affairs of the Society to its Board of Directors and, at the same time, give improper weight to the classification of its members in determining the number of votes each member may cast for the election of directors. While ASCAP's nominating committee nominates members with different participation in ASCAP's revenues, these men cannot truly represent the members having small participation in the Society's revenues since their election is dependent on the votes of those members' having large participation in the Society's revenues. Members having large participation in ASCAP's revenues (less than 5 per cent of the writer members and less than one percent of the publisher members) have the power to elect all of the Society's directors. Those having smaller participation in the Society's revenues (more than 95 per cent of the writer members and more than 99 per cent of the publisher members) do not have the combined power to elect a single director.

ASCAP's Board of Directors, elected bi-annually, is composed of 12 publisher members and 12 writer members elected respectively by publisher member and writer members. The Board has complete control of the affairs of the [fol. 225] Society. It elects the officers; its members act as the writers and the publishers classification committees; it appoints all other committees; it is in large measure self-perpetuating for it elects the committee which has the power of nominating candidates for the Board of Directors.

ASCAP's Board of Directors, as hereinbefore stated, has established a distribution system which has the effect of favoring certain members at the expense of others, and, at the same time, ASCAP has "weighted" the votes of its members so as to provide that those members who receive the greatest share of its revenues shall also have the largest number of votes. The vice of the system is that it gives those members in ASCAP who receive the largest share of

ASCAP's revenues the power to elect the directors of the Society, who, in turn, have the power to establish the rules governing the Society's system of distribution, which, in turn, determines which members shall receive the largest share of the Society's income.

ASCAP has provided that each writer member shall have one vote for every \$20 of his ASCAP income, and each publisher member shall have one vote for each \$500 of its ASCAP income. This system gives more than 50 per cent of all writer votes to less than 5 per cent of the writers, and it gives over 50 per cent of all publisher votes to less than one per cent of the publisher members. The result of this is that less than one percent of the publishers have the voting power to elect all twelve of the publishing directors, and less than 5 per cent of the writer members have the voting power to elect all twelve of the writer directors. Under such circumstances, it is impossible that true representation can be given on the Board of Directors to members with different participation in the ASCAP revenues as contemplated by Section XIII of the Judgment. For example, it is not consonant with true representation for the three largest publishers to select those who shall represent their [fol. 226] more than one thousand small competitors. Although an amendment may be placed before the membership either by receiving the approval of the Board of Directors, or by a petition signed by 15 per cent of the membership, any relief in this respect must come, if at all, by way of an order of this Court for any attempt to amend the Articles of Association to eliminate the "weighted vote," as now in effect, would itself be subject to the "weighted vote."

Proposed Order

Section IV (A) through (F) of the proposed Order is designed to remedy this situation by (1) weighting votes on the basis of performance credits rather than on the basis of a member's ASCAP income; (2) limiting to one hundred votes the number of votes which each member may have; (3) setting up a graduated scale of performance credits needed per vote, so arranged that those members having large numbers of performance credits will need more credits per vote than will their less successful competitors; (4)

making possible minority representation by providing that if a nominating petition is signed by writer or publisher members having one-twelfth of the writer or publisher votes, as the case may be, the person named thereon will be automatically seated on the Board of Directors; (5) limiting the total percentage of votes which may be held by the top ten publishing firms, including all their affiliates; and (6) permitting any twenty-five writers or publishers to nominate candidates for the Board of Directors. This is in sharp contrast with the existing practice where the publisher member having the most votes in 1957 had 1,469 votes and the writer member having the most votes in that year had 5,116 votes.

V. The Manner in Which ASCAP Shall Assure Its Members of Equal Treatment and an Adequate Opportunity to Protect Their Rights Within ASCAP

(Cf. Section V (A) through (E) of Proposed Order)

A member's "classification" is in part a result of the number of performance credits awarded to him, which, in turn, is a result of ASCAP's logging practices and the number of credits awarded for any performance. One of the [fol. 227] antitrust purposes of the suit, as expressed in Section XIII of the 1950 Judgment, was "to assure [ASCAP's] members an opportunity to protect their rights through fair and impartial hearings based on adequate information". For this purpose it was provided "That any member may appeal from the final determination of his classification by any ASCAP committee or board to an impartial arbiter or panel." In the Government's view, ASCAP's grievance machinery does not carry out these objectives, thus additional specific directives are necessary.

Existing Practice

As stated above, a member's "classification" is a direct result of ASCAP's rules of distribution. These rules are made for the publisher members by the publishers' classification committee and for the writer members by the writers' classification committee. The committees consist, respectively, of the twelve publisher members and the twelve writer members of the Board of Directors. Despite the fact that the ASCAP distribution constitutes the sole return

which its members get for their performing rights licensed by ASCAP, the members of ASCAP are not consulted about the rules of distribution. The members have nothing to say about the enactment or promulgation of the rules, nor is there any appeal from their enactment or promulgation. At the discretion of the committees, rules of distribution may be, and have been, enacted to apply retroactively. In addition, ASCAP, notwithstanding the requirements of Section XIII (B), at times has failed to publish rules which vitally affect the classification of its members, has failed to notify or advise its members concerning such rules, and has even refused to answer requests by its members con-

cerning problems covered by such rules.

Appeals are possible only as to the interpretation and application of the rules. ASCAP has failed to provide machinery so that a "member may appeal directly from the [fol. 228] final determination of his classification by any ASCAP committee or board to an impartial arbiter or panel." Rather, ASCAP has provided that any appeal by a member from the final determination of his classification shall be to the classification committee which made that determination. The grievances which may be brought before the committees' in general fall within two categories: (1) that ASCAP has failed to give credit for some performance and/or (2) that ASCAP has given inadequate or improper credit for some performance. The aggrieved member must first discover the improper application of the rules to himself. This is most difficult as ASCAP's statement of earnings, which is supplied to the members, does not designate the specific performances for which credit is awarded or the number of credits awarded specific performances of his song, and ASCAP has at times refused to make its records available to members. The committee requires the complainant to prove that performances have taken place, that they were on stations or networks being logged by ASCAP at the time of the performance, that ASCAP failed to log them or to award them proper credit. The burden of proof is at all times on the complainant.

If the decision of the classification committee is adverse to the aggrieved member, he still does not have an appeal to an "impartial arbiter or panel", as contemplated by Section XIII (C). The next appeal is to a so-called Board of Appeals, which is composed of six members elected by the membership voting under the "weighted vote" from candidates nominated by a nominating committee which, in turn, was chosen by the Board of Directors. The same rules as to the burden of proof and the scope of the inquiry apply at this stage of the proceedings. Only after these lengthy and expensive proceedings does a complainant have a right of appeal to an "impartial Board of Appeals."

In addition, notwithstanding the terms of Section XIII (D), the classification committees and board of appeals have [fol. 229] consistently failed to adequately apprise the mem, bers of the bases of their decisions. An appeal is difficult because, as a rule, no stenographic reports are kept at any stage of the proceedings. Thus, it is apparent that ASCAP's appellate machinery has been made so complex, cumbersome, dilatory and expensive as to effectively deny its mem-

ber's the right of appeal to an impartial board."

Appeals involving the interpretation of ASCAP's complex rules of distribution or the application of the rules to a specific instance are generally ineffective. For example, where a complaining member succeeded in winning the appeal, the classification committee once rewrote the rule so as to modify the decision. Further, the adjustments normally are not retroactive. By the time the appeal has been successfully prosecuted, the song involved has usually lost its popularity, and any credit to be awarded for future performances is a de minimis matter. A few members have succeeded in getting retroactive adjustments where they have been fortunate enough to be able to enlist the assistance of certain persons in the Society.

Proposed Order

Section V of the proposed Order seeks to prevent similar problems in the future by (1) clearly defining the scope of

^{*}A recent case was settled by ASCAP after it had gone through the first two stages of this appeals machinery. The settlement was designed to compensate the complainant for only his expenses and attorney's fees, and was for \$12,500. The case had required three years to proceed through the first two levels of internal appeal.

appeals; (2) eliminating one stage of the internal appellate machinery; (3) giving a member unlimited access to records of his own compositions and access to the records of the compositions of others when necessary; (4) providing for retroactive payments; (5) directing ASCAP to properly inform its members of all decisions of appellate bodies and of all new rules; and (6) providing transcripts at cost to members.

[fol. 230] Since, in order to effectively make use of the rights granted in Section IV (D) and (E) of the proposed Order, a member may find it desirable or necessary to have a mailing list of the Society's members, Section V (B) requires ASCAP to make such a list available at the written request of any member who has been a member for at least a year. In addition, ASCAP is required by Section V (A) of the proposed Order to supply each member with a copy of the Order and the attachments thereto, together with any rule or regulation hereinafter promulgated which in any way affects the member's voting rights or rights in the ASCAP distribution.

VI. The Obligation Upon ASCAP to Admit All Duly Qualified Applicants to Membership (Cf. Section VI (A) through (C) of proposed Order)

As heretofore stated, no individual writer or publisher is large enough to be able to grant and enforce licenses to the thousands of commercial music users throughout the country. The right to become a member of ASCAP may thus be indispensable for a writer, composer or publisher.

Existing Practice

The need for Section VI of the proposed Order is based on the fact that ASCAP has at times refused to admit applicants despite the fact that they clearly were qualified for admission to membership under the provisions of Section XV of the 1950 Judgment. In 1955, ASCAP refused to admit Mr. Bernard Young as a writer member, despite the fact that Young's songs had been "regularly published" by ASCAP publisher members and ASCAP itself was licensing the songs to users and collecting royalties therefor.

Not until the Government had filed an action in this Court to compel ASCAP to abide by the 1950 Judgment did ASCAP admit the applicant. In other instances, ASCAP has refused to admit applicants on the alleged ground that the ASCAP survey has shown no performances of the applicants' songs.

[fol. 231] Proposed Order

Section VI of the proposed Order meets this problem by providing that ASCAP shall grant membership retroactively to any qualified applicant previously denied membership. It further provides that ASCAP shall annually advertise in well-known trade papers the qualifications for membership. In the event an applicant is refused membership, the Society must state the grounds for turning down the applicant, and it may not refuse membership on the ground of lack of performances as shown by the ASCAP survey.

Conclusion

Our investigation disclosed the existence of various practices in six aspects of ASCAP's internal operations which were operating to frustrate or prevent the achievement of the antitrust purpose of the Government's suit against ASCAP. The proposed Order is designed to remove or curtail these practices. It is the opinion of the Government that the proposed Order will accomplish, in the six aspects of ASCAP's operations with which it deals, the antitrust purpose of this suit.

Respectfully submitted,

Alfred Karsted, John L. Wilson, Attorneys for Plaintiff, Department of Justice.

Dated: September 2, 1959.

[fol. 232]

ENDORSEMENT

The Clerk is directed to file the within brief with the papers in this suit, so that it may be available to all those interested. So ordered.

Sept. 2nd 1959.

Sylvester J. Ryan, U.S.D.J.

[fol. 233]

[File endorsement omitted]

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Affidavit of Arnold Saemann as to Mailing Documents— Filed October 9, 1959

State of New York, County of New York, ss.:

Arnold Saemann, being duly sworn, deposes and says:

I am over twenty-one years of age and am employed by the American Society of Composers, Authors and Publishers (hereinafter "ASCAP"). My duties include the supervision of mailing documents to the members of ASCAP.

Exhibit A hereto attached is a copy of a booklet containing copies of (1) a letter dated August 26, 1959, addressed to all members of ASCAP and signed by Mr. Stanley Adams, and (2) "Remarks Of Mr. Arthur H. Dean At The West Coast Meeting Of ASCAP on August 18, 1959."

On or about August 26, 1959, envelopes were addressed to all members of ASCAP by running them through the ASCAP addressograph. Thereafter one copy of Exhibit A, and no other documents or material, was inserted in each of such envelopes. On August 27, 1959, all the aforesaid envelopes, securely sealed and postpaid, irst-class, were mailed at the Grand Central Branch of the New York Post Office.

[fol. 234] Exhibit B hereto attached is a copy of a booklet containing copies of (1) a letter dated September 4, 1959; addressed to all members of ASCAP and signed by Mr. Stapley Adams, and (2) "Remarks Of Mr. Arthur H. Dean At The New York Meeting Of ASCAP on August 27, 1959."

On or about September 3, 1959, envelopes were addressed to all members of ASCAP by running them through the ASCAP addressograph. Thereafter one copy of Exhibit B, and no other documents or material, was inserted in each

of such envelopes. On September 4, 1959, all the aforesaid envelopes, securely sealed and postpaid, first-class, were mailed at the Grand Central Branch of the New York Pest Office.

Exhibit C hereto attached is a copy of a letter dated September 30, 1959, addressed to all members of ASCAP

and signed by Mr. Stanley Adams. . .

On or about September 29, 1959, envelopes were addressed to all members of ASCAP by running them through the ASCAP addressograph. Thereafter one copy of Exhibit C, and no other documents or material, was inserted in each of such envelopes.

On September 30, 1959, all the aforesaid envelopes, securely sealed and postpaid, first-class, were mailed at the Grand Central Branch of the New York Post Office.

Exhibit D hereto attached is a booklet containing copies of (1) a letter dated October 5, 1959, addressed to all members of ASCAP and signed by Mr. Stanley Adams, and (2) a "Memorandum For The Information Of Members Of ASCAP, With Respect To The New Survey Put Into Effect On October 1, 1959."

[fol. 235] On or about October 5, 1959, envelopes were addressed to all members of ASCAP by running them through the ASCAP addressograph. Thereafter one copy of Exhibit D, and no other documents or material, was inserted in each envelope. On October 6, 1959, all the aforesaid envelopes, securely sealed and post-paid, first-class, were mailed at the Grand Central Branch of the New York Post Office.

Arnold Saemann

Sworn to before me this 8th day of October, 1959,

Henry Hofschuster, Notary Public, State of New York, No. 03-6934300, Qualified in Bronx County, Certificate filed in New York County, Commission Expires March 30, 1960.

(Seal)

[fol. 236]

EXHIBIT "A" TO AFFIDAVIT

MUrray Hill 8-8800 Cable Address: ASCAP, New York

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

575 Madison Avenue New York 22, New York

STANLEY ADAMS
President

August 26, 1959

To All Members of the Society:

At the West Coast meeting, which was held on August 18, 1959, Mr. Arthur H. Dean, special counsel to the Society, addressed the meeting with respect to the proposed Consent Order which will be submitted to Chief Judge Ryan on October 19, 1959.

Because of the importance of the subject matter of Mr. Dean's remarks, a copy is being sent herewith to all of the members of the Society.

Sincerely yours,

STANLEY ADAMS, President

[fol. 236a]

REMARKS OF MR. ARTHUR H. DEAN AT THE WEST COAST MEETING OF ASCAP ON AUGUST 18, 1959

President Adams and ladies and gentlemen of ASCAP:

We are met to-day to discuss the proposed Court Order and the other documents previously sent to members with respect to certain proposed amendments to the existing anti-trust consent decree.

As artists contributing to the great cultural values of the nation. I salute you.

When I was retained by the Society last summer, it soon became apparent that we should explore with the Depart-

*ment of Justice whether the questions raised by the Department could be resolved by agreement rather than by expensive litigation. This is always the duty of counsel.

A trial of these issues would have been very lengthy and expensive. Moreover, its outcome would have been difficult to predict because of the many serious anti-trust problems posed by the fact that ASCAP represents thousands of independent and competing writers and publishers.

Although the previous consent decrees entered under the anti-trust laws between the Government and ASCAP in 1941 and 1950 imposed many restrictions on the Society, they have also served, in a certain sense, as charters which spelled out the broad areas in which, as a practical matter, the Society could operate thereunder, under the watchful eye of the Court, without fear of allegations of violation of the anti-trust laws generally from the Department of Justice.

Let me be legal for just a moment and read to you from Section XVII of the 1950 Decree, which governs these Court proceedings:

"Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Amended [fol. 236b] Final Judgment to make application to the Court for such further order and directions as may be necessary or appropriate in relation to the construction of or carrying out of this Judgment, for the modification thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

"It is expressly understood, in addition to the foregoing, that the plaintiff [the U. S. Government] may, upon reasonable notice, at any time after five years from the date of entry of this amended Final Judgment [March, 1950] apply to this Court for the vacation of such Judgment, or its modification in any respect, including the dissolution of ASCAP."

You will see that our task as your counsel was to try to convince the Department of Justice not to make such an application to the Court until we had had an opportunity to confer with them. Originally, the Department proposed to file an application to the Court around Labor Day last year.

In our first discussions with the Department of Justice lawyers, they contended that the 1950 consent decree, or ASCAP under it, did not adequately safeguard competition among the members of the Society in the writing and publishing of songs.

They claimed, for example, that the 1950 decree, or ASCAP under it, did not properly allocate, among the members, the revenues of the Society and the votes in the

Society.

The Board of Directors of ASCAP and the Society's attorneys took issue with many of the Department's contentions. Nevertheless, we hoped that a satisfactory agreement could be made with the Government without jeopardizing the fundamental values of ASCAP and its great cultural use to the nation, or the basic principles served by its practices and policies.

[fol. 236c] After almost a year filled with many conferences between the Department of Justice and ASCAP attorneys, as well as a very careful review of ASCAP's practices and policies by its own Board of Directors, its management and its counsel, a proposed Consent Order and certain related documents were filed on June 29, 1959, in the Federal District Court in New York City, and a hearing was set for October 19, 1959, before Chief Judge Ryan.

One reason why the negotiations with the Department of Justice were so time-consuming was the fact—which was not surprising—that the Department, with its manifold duties, was not familiar with all of the details of the yery specialized problems of ASCAP. This was true both with respect to ASCAP's unique position in the entertainment field and with respect to the relations between ASCAP and its members.

Only through long discussions, which were directed for the most part at acquainting the Department lawyers with these problems, were your Society's attorneys able to find acceptable solutions to the issues raised by the Department. This was possible because, in the final analysis, the Department shared the common desire to frame a Consent Order that would be consistent with the success of the entire Society and in the best interests of the general membership

and of the general public.

Copies of the proposed Consent Order and the proposed distribution formulae and weighting rules were sent to all of the members last month.

I then prepared a memorandum describing, I hope simply and concisely, how the Consent Order would affect the Society's members. A copy of that memorandum was also sent to all the members.

With your permission, I should now like to go through the proposed Order with you, attempting to explain the meaning of its lengthy provisions, the objections of the [fol. 236d] Department that gave rise to those provisions, and the ways in which those provisions will require changes in the Society's rules and practices.

In addition, I will attempt to describe the theories underlying certain of those provisions which, on first reading.

may not be clear to some of you.

This is going to be long and perhaps tedious. But I know

of no other way to do it.

I propose to take up the proposed Consent Order, page by page, which has the advantage of order but the disadvantage of not taking up the most important provisions first.

I. RESIGNING MEMBERS.

First let me take up resigning members. The first section of the Consent Order relates to the treatment of resigning members whose works continue to be licensed by ASCAP.

It is the present practice of the Society to make distributions to former publishers only out of the Current Performance Fund (55%) and to make distributions to former writers only out of the Current Performance Fund (20%) and the Sustained Performance Fund (30%), for performances of their works under licenses in effect at the time of their resignation. Technically, this rule applies only to monies received from radio and TV licensees, for the distributions of the much smaller revenues from other licensees such as hotels and restaurants are "phased out" within one year after resignation on the basis of 100%

"parity" for the first quarter after resignation, 75% for the second quarter, 50% for the third quarter, and 25% for

the fourth quarter.

After the expiration of licenses in effect at the time of a member's resignation, under the current practice it would [fol. 236e] be possible to make no further distributions to that member although (1) his works might continue thereafter to be licensed by the Society under grants from the publisher or co-writer of such works, and (2) the resigning member had not purported to grant performing rights for the subsequent period to another licensing agency.

The Department of Justice lawyers contended that this possible treatment of such resigning members tends to restrict a member's freedom (1) to leave ASCAP and (2) his freedom to license his works through a competing

organization.

The Department claimed that the existing rules prevent a member (1) from taking his works out of ASCAP or (2) from receiving adequate compensation for their performances after his resignation, even though the Society continues to license them as part of its repertory.

We have tried to deal with this fairly.

Thus, Section I of the proposed Consent Order provides that a resigning member shall continue to receive distributions on the same basis as an active member of the Society. This is true so long as his works continue to be licensed by ASCAP and by no other performing rights organization, either (a) under licenses in effect at the time of his resignation or (b) under licenses made after resignation but while the publisher or co-writer of the works in question continues to license such works through ASCAP.

There is, however, one qualification on this provision: The Society, at its option, may require that resigning members receive distribution solely on a 100% current performance basis. But if the Society exercises this option it must do so in the same way with respect to all resigning members.

[fol. 236f]

II. THE SURVEY.

Now let me turn to the proposed survey. Section II of the proposed Order concerns the new survey of performances of musical compositions by licensees of ASCAP.

ASCAP at present obtains a census of all music performances of network radio and television programs presented by CBS, NBC and ABC, which furnish ASCAP with reports thereof. In addition, ASCAP samples each day, by use of tape recorders located in 22 major metropolitan cities, a three-hour period of radio broadcasting by a station, selected randomly and in non-biased fashion, located in each of these areas, and samples a similar period of television presentation by randomly selected stations located in those areas.

ASCAP also receives three-hour tapes of local radio broadcasts from approximately 14 roving financial auditors who take daily tapes of radio stations located throughout the country in areas other than those represented by the 22 fixed locations. The tapes of local TV programs are supplemented by local film programs selected randomly from the "TV Guide" publications. The musical content of these films is obtained from film "cue sheets" which are available to ASCAP.

The Department contended, however, (1) that the local survey comprised too small a percentage of the total locally-emanating programs, (2) that the survey was not based on scientifically accepted principles of sampling design and control, and (3) that the monies received by ASCAP from the various major media such as (a) network radio, (b) network TV, (c) local radio and (d) local TV, were not being distributed in proportion to the performances in those media.

[fol. 236g] Specifically, the Department said that the Society was giving too much weight to radio and TV network performances and too little to local station performances.

Now, ASCAP was as anxious as the Department to set up a sound and workable survey on which to base its revenue distribution. What to do?

At my suggestion, Dr. Joel Dean of Columbia University, who, let me be clear, is no relative of mine, was engaged approximately a year ago to design and set up a new survey which would operate on a scientifically designed and conducted basis.

This complex task is now nearing completion.

It is not feasible to attempt to discuss the many mathematical refinements of the proposed survey. However, its salient features can be briefly and simply outlined.

(1) The Society will continue to obtain logs of all programs on the three major TV networks and all commercial programs on the CBS and NBC radio networks.

Radio network sustaining programs will be covered by the local survey and will receive appropriate credit when picked up in the local survey;

- (2) The local radio survey will be enlarged by over 50% of its present size;
- (3) The number of performance credits awarded for performances on the four major media surveyed, i.e., local radio, local TV, network radio and network TV, will be properly computed so that the number of performance credits each of those four media generates will approximate the proportion of the total ASCAP revenue attributable to each of those media; and

[fol. 236h] (4) The selection of sample tapes in the local survey will be based on a so-called scientific basis, which the experts call "random". The word "random" is not used in this context with its conventional meaning. Rather, it connotes a mathematical method of sampling selection that is wholly devoid of any bias, discrimination or "built-in" or personal objectives that might tend to favor one station or program over another.

The actual programs to be surveyed will be selected in accordance with mathematical tables similar to those com-

monly used for industrial sampling.

The significance of a "random" sample is that the probability or chance of picking up a performance on any given station or group of stations sampled is known, depending upon the depth or frequency of sampling with which the station or stations are sampled. No subjective, that is, personal or individual, considerations would be permitted to influence the selection of tapes, since that selection would be centrally controlled by an independent survey expert.

Now, if (1) the probability of surveying a given performance is known and if (2) the amount of ASCAP revenue attributable to the emanating station is known, then it is possible to multiply the surveyed performance by proper scientific multipliers that will take into account both of these factors.

Thus, a given surveyed performance will first be "blownup" or multiplied to reflect the sampling frequency with

which the particular station is sampled.

For example, if, on the average, one out of every 100 broadcasting hours of a station is sampled, a surveyed performance on that station would first be multiplied by 100. For purposes of sampling efficiency, stations within certain r venue-producing ranges will be grouped together for

similar sampling treatment.

[fol. 236i] In addition to this sampling "blow-up" multiplier, each surveyed performance will be multiplied by an economic factor designed to reflect the differences in revenue contribution to ASCAP by the various stations sampled Again, for the purpose of applying this economic multiplier stations will be grouped into broad economic bands, for example, stations paying ASCAP from \$5,001 to \$10,000 a year, etc., will be treated alike.

Lastly, the combined product of these two multipliers—the sampling "blow-up" and the economic multipliers—will be further multiplied by arithmetical factors designed (1) to produce approximately 25,000,000 total ASCAP performance credits per year and (2) to allocate the performance credits attributable to the four major media sampled, i.e., (a) network TV, (b) local TV, (c) network radio and (d) local radio, in approximate proportion to the relative share of ASCAP income generated by each of those media.

Within each major medium the combined multipliers that I have mentioned will also produce an allocation of performance credits—the unit of measurement of the results of the survey—approximately in line with the revenue contribution of the various groups of stations sampled.

Thus, if a group of stations contributes 1% of ASCAP's local radio money, they will generate approximately 1% of

the local radio credits.

The application of these principles does not mean that a single surveyed performance on a very large station will necessarily receive more credits than a surveyed perform-

ance on a very small station.

The Society, in general, will recognize the differences in license fees from various stations by taking more tapes from the big station than from the small. Therefore, although the economic multiplier for the large station may be, for example, ten times that for the small, the sampling "blow-up" multiplier for the small station may be ten times [fol. 236j] that for the large, and hence these two multipliers, when combined to produce a final arithmetical multiplier, would "cancel out" with the result that each of the two performances would ultimately be treated in approximately the same way.

Of course, in some instances there will be differences in the number of credits awarded to two similar performances on two stations of different size. But in the great majority, of cases the credits awarded to similar performances on different local stations will fall within a fairly narrow

range. .

Because of the complicated interplay of statistical, economic and other "blow-up" factors needed to produce an estimated 25,000,000 total performance credits per year by the application of scientific sampling principles, the final arithmetical multipliers still remain to be worked out by

an independent expert.

The proposed Consent Order also provides that an additional independent outside expert will be appointed by the Court to review the design and operation of the survey and to comment on its size, scope and accuracy to the Court; the Department of Justice, and ASCAP. In the event that the Department seeks to have the size of the survey increased at some future date, the Society can submit evidence to the Court as to the cost of any recommended increase.

The point is that the survey must be fair.

III. THE DISTRIBUTION FORMULAE AND WEIGHTING RULES.

I now turn to Section III of the proposed Consent Order which concerns the distribution of the Society's revenues

among its members. For most of the members, this is probably the most significant part of the proposed Order. It affects your pocketbook and that is a vital nerve. [fol. 236k] The Department of Justice contended that under the existing distribution plans, seniority of membership, age of composition, and the length of the period of averaging performance credits, were emphasized to such a degree that the writing and publishing of new songs by young writers and new publishers may be discouraged. If so, this would be against the public interest.

In addition, on the writers' side, the Department said that the carry-over effects of the pre-1950 classifications still dictated, to a substantial extent, the amount of distri-

bution to many of the older writer members.

A great deal of time was spent-with Department officials explaining the peculiar hazards and risks of the songwriting profession and the music publishing business, which you all know better than I, and the efforts that have been made by ASCAP to eliminate some of the "feast or famine" elements by such principles as "averaging".

The reasons for "seniority" and "availability" in ASCAP's distribution system were likewise explained at length. In part, the "seniority" principle recognizes that the Society was built to its present strength largely by members who received little return until fairly recent times; in further part, it served as a form of averaging

over the long term. .

The principle of continued "availability" recognized the added value to the Society's catalog, as a part of the ASCAP licensing package, of musical compositions which had firmly established their importance to the Society's licensees and thus contributed very importantly to the Society's revenues.

In addition, the Society pointed out that in many music uses, such as for theme and background music, generally speaking the value to the user-of a well-known and well-established work far exceeds that of an unknown work that might be used as theme or background music. And this is [fol. 2361] for the reason that an audience, for the most part, immediately recognizes a well-known work and it automatically evokes certain fond or pleasant memories or as-

sociations which are of value to the user, who is willing to

pay accordingly.

With respect to distribution generally, the Department argued that each member, whether a writer or a publisher, and without distinction between members, should receive—without any restriction—distribution solely on the basis of the Society's most recent performance records. If this were required, it would destroy ASCAP as we know it.

These two positions were reconciled by giving both writers and publishers an option either (1) to receive distribution solely on the basis of current performance credits or (2) to continue to receive distribution under plans

essentially comparable to those now in effect.

I should like now to describe first the writers' distribution formula, and then to turn to the publishers' distribution formula.

A. WRITERS' DISTRIBUTION FORMULA, PRESENT AND PROPOSED.

1. The Present System. As you know, 50% of the net distributable revenue of the Society is paid to the writer

members and 50% to the publisher members.

The Writers' distributable revenue is now divided into four funds: (1) The Current Performance Fund (20%); (2) The Sustained Performance Fund (30%); (3) The Availability Fund (30%); and (4) The Accumulated Earnings Fund (20%).

- a. The Current Performance Fund (20%). Distribution from the Current Performance Fund is based solely on the current performance credits received by [fol. 236m] a writer member during the latest available fiscal survey year, each writer member sharing in the Fund in direct proportion to his current performance credits.
- b. The Sustained Performance Fund (30%). Distribution from the Sustained Performance Fund is based upon the average number of performance credits received by each writer member during the preceding

five or ten years, at his option, subject to certain mathematical limitations on the rate of promotion or

demotion in his standing in this Fund.

At the inception of the Sustained Performance Fund in 1950, the classifications of the writer members prior to that date were used as the initial basis for computing their standings in this Fund. Since that time, all classification movements by the writer members have been determined solely upon the basis of performances surveyed by the Society during the preceding five or ten years.

ASCAP annually calculates each writer member's classification, a point rating. Each such member then shares in the Fund quarterly on the basis of his points as a fraction of all Sustained Performance points of

all writer members.

c. The Availability Fund (30%). Since 1952, the Availability Fund has been distributed on the same mathematical basis as the Sustained Performance Fund, except that there are more restrictions on classification movements in the Availability Fund than in the Sustained Performance Fund.

In addition, before the value of classification points in this Fund is computed, up to \$50,000 per quarter may be deducted from this Fund for special awards to writers of works having a unique prestige value or works performed in media not surveyed by the Society.

[fol 236n] d. The Accumulated Earnings Fund (20%). A writer's participation in the Accumulated Earnings Fund is computed by multiplying the average of his Sustained Performance and Availability classifications by the quarters of his continuous membership in ASCAP. In this way there is obtained his Accumulated Earnings points, which determine his share of this Fund.

2. The Proposed System.

a. Current Performance Option. Now let me turn to the proposed system. Under the proposed Order, any writer member would be permitted to elect to receive payments solely on the basis of current performance credits earned in the prior fiscal survey year, except that if the writers classified at 975 points—39,000 performance credits divided by 40 = 975—and above 975—currently the top approximately 100 writer members in ASCAP—vote in a special election to be held for that purpose, to withhold from themselves the current performance option, then the current performance option would be applicable only to the first 39,000 annual performance credits of an electing writer, or the lowest number of average performance credits of any writer from whom the option is withheld, if that lowest number should be higher than 39,000.

For credits earned in excess of such number, a writer electing the current performance option will be paid on the basis of the four-fund system. That is, such a writer would share in the 20% Current Performance Fund on the basis of all credits received by him; in addition, he would be given rankings in the other three funds as if his one-year total were a five-year average, but those rankings would then be reduced by 975 points, the value represented by the credits for which [fol. 2360] he would be paid on the current performance option basis.

Approximately the top 100 writer members will be given an opportunity to decide for themselves as a group, by a majority vote of such writers, to withhold the current performance option from these 100 writer

members.

For the purpose of this vote a majority shall require both (1) a majority of those writers who vote in such election and (2) writers who together hold a majority of the total average performance credits of all those writers who vote in such election.

In the event that the top®writers vote to withhold the current performance option from themselves, another such election to determine whether they wish to continue withholding the option may be called at the end of three years by a petition signed by either (1) 25 in number, or by/25% of such top writer members, the percentage to be computed on either a members,

ber or an average credit basis, or (2) by the Department of Justice.

The theory underlying this provision of the proposed Order is that the writers with the most performance credits in ASCAP should, if they wish, be permitted the opportunity to continue their present practice of receiving considerably less money per performance credit than do those writers whose works have received fewer performance credits. The result is that the amounts so withheld from the writers with the most performance credits are pro-rated among the other writer members with fewer performance credits, thereby appreciably benefiting the majority of the writer members, and thus helping to promote the Society and the songwriting profession as a whole.

[fol. 236p] Under the proposed Order, a writer would be permitted to elect the current performance option

for any subsequent survey year.

But, having so elected, he would for bookkeeping reasons be initially bound to that option for two years. If he later returned to the four-fund system, and thereafter again chose the option within the next five years. he would then be bound to the current performance option for five years.

A writer member who elects the current performance option may thus return to the four-fund system. In that event, however, he receives no credit in the Membership Continuity Fund for the period of his current performance election in which his current per-. formance credits did not exceed 39,000 or such higher

number as already described.

For purposes of computations for the Average Performance and Recognized Works Performance Funds. a writer cancelling his current performance election will have his performance credits, if any, for the years next prior to his election credited as if they were received in the years immediately preceding his return to the four-fund system.

b. The Four-Fund System. For those writers who continue to receive payment on the four-fund system. several changes would be made in that plan.

Let me outline them as follows:

- (1) The Current Performance Fund (20%) would continue in the same form as it is today.
- (2) The Average Performance Fund (30%) would replace the present Sustained Performance Fund and would operate in essentially the same fashion, i.e., on the basis of the most recent five-year performance credit average of each writer member.

 [fol. 236q] To meet the views of the Department of Justice, two significant changes would be made in that Fund, however: (1) writers would not be permitted to elect a ten-year rather than a five-year average, and (2) (a) classification increases based on the most recent available five-year averages would be spread over a two-year period and (b) decreases would be spread over a three-year period, rather than according to the complicated mathematical limitations on classification movements now in effect.

Please note the hypothetical examples set forth in the Appendix hereto which, although not part of the oral remarks, are furnished as a guide which members may find helpful in seeing how classification increases and decreases would be calculated under the new plan.

(3) The Availability Fund (30%) would be replaced by the Recognized Works Performance Fund, which would be distributed on the same basis as the Average Performance Fund, except that payment out of this Fund would be limited to credits received by works performed at least four quarters after their first surveyed performance.

The basic theory underlying the Recognized Works Performance Fund is that songs become more valuable to the user as they demonstrate the durability of their public acceptance. It is firmly believed by the Board of Directors and counsel as a fundamental principle of ASCAP that those songs which are per-

formed long after their initial "plug" period contribute more overall to the continued value of the Society's catalog than do brand new works that may be performed a comparable number of times during the same survey year.

[fol. 236r] Because of the special place of fond-memories or pleasant recollections that well-known and established songs held in the minds and hearts of an audience, it is believed that their value cannot be equated on a straight one-for-one performance basis with compositions that have not yet attained comparable recognition stature with listeners or viewers of all ages and different economic means.

Thus, time and again in the negotiations with the ASCAP licensees, it has been emphasized in one way or another that the key bargaining assets of the Society with the users, which their directors can utilize as they see fit, are its standard songs and established catalogs and their continued availability.

The Recognized Works Performance Fund would recognize this added contribution by compensating, in that Fund, only for performances of songs that had demonstrated a degree of sustained public recognition and demand.

Without this Fund, there would be no distinction in the credit awarded to different songs, except for the Weighting Rules, despite the very real differences in value to the user that exist between transitory "hits" and works of lasting public acceptance.

Of course, writers classified below 975, or those classified in 975 and above in the special election, may elect to be paid on a 100% current performance basis. They may thus avoid being subject to the application of the Recognized Works Fund.

(4) The Member hip Continuity Fund (20%) would replace the Accumulated Earnings Fund (20%). It would be distributed on the basis of (a) a member's continuous quarters of membership, not to exceed 42 years, and (b) the member's Average Performance Fund rating, rather than, as at present,

[fol. 236s] on the basis of the average of his Sustained Performance and Availability ratings.

(5) Before any distributions are made to the writer members under the current performance option or the four-fund plan, up to 5% of the writers' distributable revenue can be deducted for the purpose of making awards for works of unique prestige value or for works substantially performed in media not surveyed by ASCAP.

Awards under this provision will be made by an independent panel of experts and will be announced by the Society to all writer members in advance of payment. Some members may dislike the publicity but, on the theory of the right of the public to know, it permits any member who believes that he has been overlooked or that the awards are inadequate or improper in any respect, to apprise the Society of his views.

The Department has agreed that the Writers' Distribution Formula which I have just outlined complies with the proposed Order.

The proposed Order itself requires that at least 20% be distributed on the basis of current performances and at least 30% on the basis of average performance credits.

The Order further requires, and I call your specific attention to the change in wording, that not more than 30% be distributed on the basis of performances of Recognized Works and not more than 20% on a basis which includes

confinuity of membership.

The over-all Writers' Distribution Formula, consisting of the inter-related Four Funds and the Current Performance Option, have been given the most serious considera-[fol. 236t] tion by your Board of Directors and counsel. It may not be amended by the Society itself without 30 days' prior written notice to the Department, and any amendments would have to conform to the proposed Order. Changes cannot be made in one fund without affecting the inter-related parts and consequently the rights of individual members. No proposed change can therefore be considered alone.

B. Publishers' Distribution Formula, Present and Proposed.

'Now let me turn to the Publishers' Distribution Formula.

- 1. The Present System. Let me take up first the present system. The publishers' distributable revenue is divided into three funds: (1) The Current Performance Fund (55%), (2) The Availability Fund (30%), and (3) The Seniority Fund (15%).
 - a. The Current Performance Fund (55%). The Current Performance Fund is distributed on the same basis as the Writers' Current Performance Fund, i.e., the number of current performance credits received by each publisher during the latest available fiscal survey year determines the extent of its participation.
 - b. The Availability Fund (30%). The Availability Fund is distributed on the basis of a five-year accumulation of performance credits attributable to performances of works that were picked up in the Society's survey two years prior to such performances, i.e., compositions that have demonstrated a substantial degree of durable public acceptance.
 - c. The Seniority Fund (15%). Participation in the Seniority Fund is determined by multiplying the number of performance credits earned by each publisher member during the latest available five fiscal survey [fol. 236u] years by the number of quarters that such publisher has been a member of ASCAP.

2. The Proposed System.

Now, let me explain the proposed Publisher's Distribution Formula.

a. The Current Performance Option. The publishers, like the writers, will also have the opportunity of electing to receive distributions solely on a current performance basis.

However, inasmuch as the publishers will lose their seniority ratings over a five-year period, and unlike the writers, will not have the right to elect a five-year average, in order to avoid sharp initial dislocations of income which many publishers have relied on in the past, this option will be graduated over a period of five years on the following basis:

For the first applicable fiscal survey year, an electing publisher would receive 75% of the amount to which he would be entitled if all publishers were on a current performance basis. For the second year, 80%, and so on until after five years, i.e., in 1964, any publisher electing the current performance basis of distribution would be entitled to 100% of the amount he would get if every publisher were paid solely on a current per-

formance basis.

Alternatively, a publisher can continue on the regular plan for several years and then move over to a current performance basis, at that time receiving whatever the applicable percentage may be for that year on the current performance side. Once, however, a publisher shifts to the current performance basis, he will continue to receive payment under that system.

- b. The Three-Fund System. For those publishers preferring not to receive distribution solely on the basis [fol. 236v] of current performances, several significant changes will be made from the existing system:
 - (i) The Current Performance Fund (55%) will remain the same.
 - (ii) However, the Availability Fund (30%) will be replaced by the Recognized Works Performance Fund and payment therefrom will be on the basis of credits earned during the preceding fiscal survey year, rather than during the five preceding years, by songs at least one year old—in terms of performance—rather than two years.
 - (iii) The Seniority Fund (15%) will be replaced by the Membership Continuity Fund. This Fund will be phased out at the rate of 3% a year, with a corresponding increase in the Current Performance Fund, so that after five years 70% of the money paid out under the regular plan will be on the basis

of current performance credits and the remaining 30% will be paid out on the basis of Recognized Works.

C. FOREIGN REVENUE.

I now turn to the question of foreign revenues.

The Department has questioned the present method of distributing the royalties which ASCAP receives from

approximately 22 foreign societies.

It is the current practice of ASCAP to distribute Canadian, English and Swedish revenues on the basis of the respective reports received from those countries; these sources furnish ASCAP complete reports in usable form for distribution. All other foreign revenue is currently distributed on the basis of English and Swedish reports.

ASCAP has agreed that if the revenue from any foreign source exceeds \$200,000 per annum, and the reports fur[fol. 236w] nished ASCAP allocate credit in reasonably identifiable form separately by compositions performed and indicate the members in interest, such revenue will be separately distributed on the basis of those reports. Other foreign revenue will be distributed on the basis of the most reliable information ASCAP has as to foreign performances generally.

ASCAP has received more than \$200,000 per annum from England since 1943, from France since 1952, from Canada since 1953, and from West Germany since 1955. The French and German reports are in usable form, however, only with respect to non-film performances. Accordingly, it has been agreed that French and German non-film reports will be used for the distribution of French and German non-film revenue, and added as a basis for dis-

tributing foreign non-film revenues generally.

At the present time no other country making a significant contribution to ASCAP furnishes reports that could be economically used as the basis for distributing its revenue.

If, in the future, the Society receives \$200,000 a year or more from any country that provides adequate and comprehensible reports, ASCAP will endeavor to use those reports to the extent reasonably possible.

D. WEIGHTING RULES, PRESENT AND PROPOSED.

Next, let me discuss the present and the proposed Weighting Rules.

1. The Present Rules. At the present time, when a performance of an ASCAP composition is picked up in the survey, it is given an initial value through reference to the "Weighting Rules."

The basic unit of measurement under these rules is a

"performance credit."

[fol. 236x] Each feature use of an ASCAP work, except public domain arrangements and certain serious works, is awarded one performance credit, multiplied by the number 20 in the case of locally-emanating performances and, in the case of commercial network performances, by the number of stations carrying the program in question.

A further multiple of 3 is then applied if the surveyed performance was on television rather than radio. This was done in an attempt to correlate the number of performance credits, generated by the two media with the relative

amounts of ASCAP, revenue from those media.

In 1957, for example, 52% of ASCAP's revenue came from television and 36% from radio. On the other hand, television would have accounted for only 30% of the combined radio-television performance credits, if performances on both media were treated alike.

The multiple of 3 for television credits was an attempt to restore the balance between performance credits and revenue received from the two media, with the result that $56\frac{1}{2}\%$ of the credits went to television performances, and $42\frac{1}{2}\%$ to radio performances.

These figures change from time to time and will be under review by the independent expert to be appointed by the Court.

Non-feature uses, i.e., as a theme or jingle or as background, cue or bridge music, have been awarded fractional credit unless the work so used had previously accumulated substantial performance credits, thereby generally indicating its wide recognition or associative value for the audience of the user.

Credit for these non-feature uses ranges from 1% to 100% credit, depending upon the prior history of the work so used. This disparity in credit was one of the things which the Department of Justice criticized.

[fol. 236y] Music with no substantial prior history of performance is awarded credit on a time basis when used as background music, i.e., 20% credit for each three minutes thereof.

Music lacking a history of substantial prior performances have been awarded, 1/10 of 1% credit when performed as non-feature music by less than four instruments. This was done in order to prevent a disproportionate allocation of royalties for such uses of unknown works when performed by organists or pianists on oft-recurring programs such as daytime dramatic serials.

Multiple performances of the same work on the same program are given 10% of the otherwise applicable credit for each subsequent performance after the first one on that program.

Serious works requiring four minutes or more for a single complete rendition are given extra durational credit, who neerformed for four minutes or more.

Copyrighted arrangements of works otherwise in the public domain receive from 20% to 100% credit depending upon the amount of original material contained therein.

2. The Proposed Formula

I now turn to the proposed new Weighting Formula.

The Board and counsel believe that the weighting principle is fundamental to the essential philosophy of ASCAP.

In a non-feature use, a well-known song will generally be performed only with the specific intent of projecting the content image or memory associated with that song into the format or storyline of the program. Thus, such a use is given a prominent place in the program throughout the period of its performance.

An unknown or relatively unknown composition, on the other hand, can be performed in a non-feature role with only passing or brief atmospheric effect on the audience.

[fol. 236z] Under the proposed Order, the Weighting Rules applicable to credit for uses as themes, jingles, background, cue and bridge music would be substantially revised, as I shall describe later.

- a. The Qualifying Test. A new, and we think sounder, test has been developed for determining which songs will qualify for more than minimum credit when used as non-feature music. For full credit when so used a song must
 - (a) have accumulated 20,000 feature performance credits, i.e., credits not earned for theme, jingle, background, cue or bridge uses, and (b) have earned 2,500 feature performance credits during the five most recent survey years, towards which number not more than 750 can be counted in one year.

The latter requirement would be reduced proportionately for songs with less than 5 years of performance credits. In addition, 25%, 50% and 75% credit will be awarded to partially qualifying songs when used as themes and 50% credit for partially qualifying songs when used as background music.

A "Thenre" is defined as a musical work-used as an identifying signature of a radio or television personality or of all or part of a radio or television program or series of programs. A musical work (other than a jingle) used in conjunction with a commercial announcement shall receive the same credit as a theme.

"Background Music" is defined as mood, atmosphere or thematic music performed as background to some non-musical subject matter being presented on a radio or television program. A vocal or a visual instrumental rendition of a work on any medium shall not be regarded as background music regardless of the context in which performed.

[fol. 236aa] Thus, the new test has a double requirement: (1) the work must have attained a sufficient "hit" status at one time to indicate its audience recognition value and (2) it must have enjoyed some recent popularity, indicating that it is still alive in the minds of many listeners and will invoke response.

For works first performed before 1943, when the Society began to maintain adequate records of performance credits, the 20,000 feature credit requirement could be met if the work were listed in (1) the publication "Variety Music Cavalcade", published by Prentice-Hall in 1952, (2) as one of the "top ten" hits on the "Lucky Strike Hit Parade" or (3) as one of the "top ten" on the weekly lists of the most popular songs published in Variety or (4) Billboard.

"Variety Music Cavalcade", the "Lucky Strike Hit Parade", Variety and Billboard were selected for this purpose because, in the considered opinion of the Board of Directors and management of ASCAP, they represent the best available reference sources for ascertaining the status of works performed before 1943. Not including other references would probably be only a theoretical or academic omission because almost all "hit" songs performed before 1943 and which have received 2,500 feature performance credits in the five latest survey years are probably included in one of the fists referred to. Or, if not listed in any of them, they probably would have received 20,000 feature performance credits since 1943.

Between 1943 and 1955, the Society's records aid not clearly indicate whether credits were for feature performances or for non-feature performances such as theme and background music. If a work first performed after January 1, 1943, appeared in any of the abovementioned publications, it would be presumed that credits earned by it prior to October 1, 1955, were for [fol. 236bb] feature performances; if it has not so appeared, and if the work has not earned the required number of performance credits within its first two years, the burden would be on the member to establish that performance credits recorded for his work between 1943 and 1955 reflected feature performances. Of course, the records of the Society would be open to a member for that purpose.

For your information, the Society has been surveying all radio network performances since 1936, by use

of logs furnished by the networks. A similar survey of television network performances was started in 1949.

A sample survey has been conducted of local radio programs since 1950, and of local television programs since 1951. The local surveys have been conducted by taking tape recordings of sample programs, supplemented in the case of local television by the use of "TV Guide" and film "cue sheets". In addition, the Society has surveyed performances by symphonic and concert licensees.

Starting January 1, 1943, dates of all performances were recorded and, when the local surveys started, performances on local radio and television were so noted. It was not until October 1, 1955, however, that the records of the Society indicate the various uses of a given performance, for example, feature use, theme, background, jingle, etc.

b. Credit Provisions

I turn to the credit provisions in the Weighting Formula:

(i) Feature Performance. All uses except those credited as themes, jingles, background music or cue and bridge music, as defined in Section A of the Weighting Rules, are described as "feature performances".

[fol. 236cc] Each feature performance of a work, except public domain arrangements and certain serious works, which I discuss later, will be awarded full credit, except that (a) each repeated use of the same work on a single program after the first one, will receive only one-tenth credit, with a maximum of two full credits for any single program and (b) credit will not be allowed for more than eight feature performances per quarter hour.

(ii) Themes. A "qualifying work", when used as a theme, will be awarded 100% credit, or 75% or 50% or 25% credit, depending upon its past history of feature performances, for all such uses within the first hour of any two hour period, and

one-tenth of the otherwise applicable credit for all additional such uses during the second hour.

A "non-qualifying" work used as a theme will receive 10% credit for all such uses within the first hour of any two-hour period and 1% credit for all additional such uses during the second hour.

Musical works, other than jingles, used in conjunction with a commercial announcement will receive the same credit as a theme.

as background Music. A qualifying work used as background music will receive full credit or 50% credit depending on its history of prior feature performances.

Non-qualifying works will receive 20% credit if they have been commercially published for general public distribution and sale, if commercial recordings have been made as "singles" for general public distribution and sale, and if five feature performances of the work have been recorded in the local radio sample survey in the five preceding fiscal survey years.

[fol. 236dd] For each repeated use on a single program after the first one, one-tenth of the credit provided above will be awarded, with a maximum of two times the credit awarded for the initial performance.

Other non-qualifying background music on each program will receive, for each three minutes' duration in the aggregate for that program, 20% credit; fractions of three minutes will be computed on the basis of 5% for each 45 seconds or major fraction thereof.

(iv) Cue and Bridge Music. Let me now turn to cue and bridge music.

"Cue Music" is defined as music used on a radio or television program to introduce, but not to identify, a personality or event thereon. The term "cue music" includes, but is not limited to, introductions, "play-ons", and "play-offs".

"Bridge Music" is defined as music used on a radio or television program as a connective link between segments or portions thereof.

A qualifying work used as cue or bridge music will receive 10% credit for all uses during the first hour of any two-hour period and 1% credit for all such uses in the second hour.

A non-qualifying work will receive 1% credit for all uses during the first hour and 1/10 of 1% credit for all such uses in the second hour.

(v) . Jingles. I turn now to jingles.

A "Jingle" is defined as a musical message containing commercial advertising matter, where (a) the musical material was originally written for commercial advertising purposes or (b) the performance is of a musical work, originally written for other [fol. 236ce] purposes, with the lyrics changed for commercial advertising purposes with the permission of the ASCAP member or members in interest.

Unlike the present Weighting Rules, no distinction whatsoever shall be made in credit awarded to works used as commercial jingles. Jingles will each receive 1% credit for all uses during the first hour of a two-hour period of programming and 1/10th of 1% for all uses in the second hour.

- (vi) Copyrighted arrangements. The credit provisions for copyrighted arrangements have been rewritten so as to permit from 10% to 100% credit, depending upon the amount of original new material, either lyric or melodic.
- (vii) Other Provisions. Other provisions of the proposed Weighting Rules permit the Society to limit the credit that may be awarded to works performed on dramatic programs 15 minutes or less in duration, presented two or more times a week.

The Society will continue to give extra durational credit for surveyed works which require four minutes or more for a single, complete rendition thereof, and which in their original form were composed for a choral, symphonic or similar concert performance, including chamber music, when those works are actually performed for the periods of time specified.

A durational credit system was inaugurated in 1945 and assumed its present form in 1955 for local performances and in 1957 for network performances.

In addition, performances of concerts by symphony orchestras on national network sustaining programs may be awarded credit equal to performances on a network of 50 stations. Works performed on all other [fol. 236ff] radio net work sustaining programs will receive credit when picked up in the local survey.

ASCAP may also distribute to its members, for performances of their works in concert and symphony halls, amounts five times the amount of the license fees received from ASCAP's concert and symphony hall licensees.

That concludes the discussion of the Weighting Formula. But before leaving the subject of weighting, let me explain the difference between two documents which all members received.

One document, entitled "Weighting Rules", appears as Attachment C to the proposed Order itself. These general provisions govern what may be contained in any detailed weighting formula which the Society adopts, unless a revision of the Weighting Rules should be ordered by the Court.

The "Weighting Formula" which the members also received as a part of the same booklet, contains the detailed weighting provisions which the Department has agreed initially comply with requirements of the Weighting Rules.

The Weighting Formula may not be amended by the Society without 30 days' prior written notice to the Department, and any amendments would likewise have to conform to the Weighting Rules attached to the Order itself or to a Court-ordered revision thereof.

[fol. 236gg] IV. Voting.

Let us now turn to Section IV of the proposed Consent Order, which provides for the new voting formulae, and which would substantially change the present method of allocating votes.

· A. PRESENT SYSTEM.

At present, each writer member has one vote for every \$20 of annual ASCAP income and each publisher member has one vote for every \$500 of annual ASCAP income, with no limit on the number of votes held by any one member.

Elections for directors have been held once every two

vears.

Of the 12 writer members of the Board of Directors, one has been a Director since 1920, two were first elected in the 1930's, two in the 1940's, and the remaining seven in the 1950's, including two in 1957 and three in 1959.

There are 12 publisher directors. Two publishers have been represented on the Board of Directors since 1914, two since 1924, one since 1938, two since 1939, one since 1947, three since 1957 and one since 1959.

B. PROPOSED SYSTEM.

Under the proposed Consent Order, votes would be allocated solely on the basis of performance credits earned in the preceding fiscal survey year, rather than on dollar revenue. The votes would be computed in accordance with a diminishing returns formula under which a member would have to earn progressively more credits for each additional vote.

No member—writer or publisher—would be allowed more than 100 votes.

[fol. 236hh] The new voting rules provide other significant changes:

1. If at any time there is an increase of more than 10% in the percentage of total publisher votes held by the top ten publisher members and their affiliates, the publishers' voting formula must be revised to bring the votes of such publishers back within 10% of the amount which they would initially hold under the new voting formula.

The top ten publisher members and their affiliates would, according to the latest available figures, initially hold about 37% of the total publisher votes; thus, the maximum which could be held by any ten publishers, including their affili-

ates, would be about 41%.

For your information, the top 50 publishers out of a total of about 1400 publisher members would, according to the latest available figures, have 2,479 out of a total of 4,908 publisher votes, or 501/2% of the total. Fourteen of these publishers are affiliated with others among the top 50, so that the foregoing statistics represent 36 separate publisher members and affiliates.

The new publishers' voting formula will reduce the voting strength of the top ten publishers and their affiliates from about 63% at present, to about 37% of the total publisher votes; it will also reduce the voting strength of the top 50 publisher members from about 78% at present, to about

50% of the total publisher votes.

The twelve publisher members of the Board of Directors, including affiliated publishers, would initially have about 1,507 out of a total of 4,908 publisher votes, or slightly over 30% of the total. This is a substantial reduction from 56% of the votes under the voting system now in effect. Under the new formula, of the 12 publisher members of the Board of Directors, including affiliated companies, one would have 424 votes, one would have 394 votes, three would have between 108 and 253 votes, three would [fol. 236ii] have between 39 and 98 votes, and four would have between one and six votes.

- 2. In any election for the Board of Directors, 25 writer members may nominate an eligible person as a writer director, and 25 publisher members may nominate an eligible person as a publisher director.
 - 3. Any group of writer or publisher members representing 1/12th of all the writer or publisher votes, as the case may be, can elect one director by signing a petition in hiss support at least 90 days before the date of any scheduled directors' election.

In that event, the number of directors to be elected in the general election would be reduced by the number of directors elected by petition. Members who elect a director by signing such a petition naturally would be precluded from voting again in the general election.

It would take publishers with an estimated 409 votes to elect a publisher director under the above provision. This

would require a varying number of publisher members. Thus, it would take 409 of the 628 publisher members who have only one vote each to elect a publisher director. On the other hand, there are four publisher members, not presently represented on the Board of Directors, who together have enough votes to elect a member of the Board of Directors under this proposal.

On the writers' side, it is estimated that there will be in excess of 15,000 eligible votes under the new system. Thus, it will take about 1,300 votes to elect a writer mem-

ber of the Board by petition.

4. An election of directors must be held within one year after the effective date of the proposed Order, probably early in 1961. All directors shall be elected at the same [fol. 236jj] time, except for those elected by petition, and the number of directors shall not be less than 24.

• The voting provisions contained in the proposed Order attempt to give fair recognition to the fact that the more than 6,000 members of ASCAP make varying contributions

to the value of the available ASCAP repertory.

At the same time, however, these provisions would substantially broaden the base of present yoting strength. As a result, the members with the most popular catalogs would receive a far smaller percentage of the total votes than the percentage of total ASCAP performance credits attributable to their catalogs.

Other provisions that I have mentioned attempt to give minority groups an opportunity to get together to nominate or elect a director to represent their views on the

Board of Directors.

V. Information and Complaint Procedures.

I now turn to the provisions respecting information and complaint procedures.

A. ACCESS TO SOCIETY'S RECORDS.

Under the proposed Order, ASCAP would be required to make available for inspection by any member a list of the mailing addresses of all members, except those mem-

bers who'refuse to have their addresses revealed, in which event ASCAP will forward, unopened, any mail addressed to that member in care of ASCAP.

Within nine months after the end of each survey year, ASCAP would prepare alphabetical lists of all the compositions that received performance credits during that year, indicating thereon the number of credits received by each.

[fol. 236kk] In addition, the Society would maintain records showing the number of feature performance credits received during the five preceding fiscal survey years by all works that received credit during the preceding year as a theme or as background, one or bridge music.

Any member or his authorized agent will be permitted to inspect such lists and such records with respect to his own compositions. Other portions of such lists and records shall be available for inspection by any member or his authorized agent to the extent that inspection is sought in good faith in connection with any financial interest of such member as a member, as opposed to his personal or business interests apart from his membership in ASCAP. In this context "good faith" would embrace any legitimate interest of a member in respect to his relations with ASCAP so long as that interest was not inimical to the welfare of the Society.

All other records of the Society relating to distribution shall be open for inspection by any member or his authorized agent for good cause, which really means any sound, legitimate reason, provided that such member shall have been a member of ASCAP for at least one year prior to his request for inspection.

The object of these provisions is, of course, to safeguard each member's legitimate right to information affecting his participation in the ASCAP royalties, while at the same time preserving the privacy of other members' affairs from unnecessary inquiry. It would be impossible to list the many and varying instances or the facts under which inspection would be either proper or improper.

Hence, the concepts of "good faith" and "good cause" were adopted because they have been found both desirable and workable in other similar areas. They have frequently

been used as general statutory language governing the [fol. 236 II] right of inspection and have worked well. They are not just legal gobbledygook words.

B. THE COMPLAINT PROCEDURE.

Under the proposed Consent Order, ASCAP would be required to establish a Special Board, elected in the same manner as the members of the Board of Directors, to entertain complaints by a member relating (1) to the distribution of ASCAP revenue to such member or (2) to any rule or regulation of the Society directly affecting distribution of the Society's revenues to such member. Currently, all such complaints are initially heard by the writers' or publishers' Classification Committees.

Under the proposed Order, a complaint would have to be filed within nine months of the receipt by a member of the annual statement or the rule or regulation on which his complaint is based.

Each member would have a direct right of appeal from any decision made by the Special Board to an impartial panel of the American Arbitration Association.

VI. Admission to Membership.

The last subject-matter of the proposed Consent-Order deals with admission to membership.

Any person whose application for membership has previously been denied between March 14, 1950, the date of the Consent Decree, and the effective date of the proposed Order, and who reapplies for ASCAP membership, will be admitted retroactively to the date of his initial application or 1950, whichever is later, if (1) he was eligible for membership at that date and (2) if he did not subsequently license, through another performing rights organization, the works upon which his qualification for membership is based.

[fol. 236mm] Assuming he qualifies for retroactive admission, this retroactive admission, in many instances, will be only for the purpose of seniority ranking.

Under the existing Consent Decree, ASCAP is not per mitted to limit its membership by refusing admission to duly qualified applicants. The proposed Order makes no change in this respect.

I am sure you will be delighted to know that this concludes my detailed discussion of the substantive provisions of the proposed Consent Order.

VII. GENERAL REMARKS

Having tried your patience thus far, let me make some general remarks.

If the proposed Order and related documents are approved by Judge Ryan this fall, thereafter certain portions of the Articles of Association relative, for example, to voting and grievance procedures, will have to be submitted to the general membership of ASCAP for approval.

If the required membership approval is given, ASCAP will file with the Court a statement to that effect and the date of filing that statement will be the effective date of the Consent Order.

If the membership does not approve the necessary changes in the articles within the allowed time, which is three months, the Order will be vacated without prejudice to either party. In that event, the issues raised by the Department of Justice would have to be litigated.

This would mean not only great expense but complete uncertainty as to the result and its timing. In any event, in the ensuing period of litigation, ASCAP's position in [fol. 236nn] the industry would be jeopardized and its negotiations with its licensees would be seriously prejudiced.

Some members may feel that the changes which are proposed in the plan before you would adversely affect rights which they now have under the present system where, for example, they may have chosen the ten-year basis in the Sustained Performance Fund whereas it is proposed that everyone not electing the current performance option be put on a five-year basis in the Average Performance and Recognized Works Performance Funds.

Let me remind you that ASCAP and the members are operating under the 1950 decree of the Court. At the

start I read you Section XVII of that decree, which permits the Department of Justice to apply for further relief and the Court retains jurisdiction so it can grant further relief.

All rights of members in the distribution of revenue are subject to that basic document and to the Society's Articles of Association. Members' rights thus are not absolute rights.

If the proposed Order is approved by the Court and the necessary changes in the Articles of Association are approved by the membership, then the members will have the assurance of knowing what they will receive, under a plan which I believe is fair.

Unless circumstances change materially, you can rest assured the proposed plan will operate for the reasonably foreseeable future. But if there are completely new and different facts, the Department of Justice or the Court might call for new hearings.

If the proposed Order is not approved, the members will have no assurance of what the future holds in store, and if the matter is litigated, the result may well be far less attractive than what is being proposed today.

[fol. 23600] In order to keep my remarks within reasonable limits, I have not discussed some provisions in the Consent Order that speak for themselves and need no explanation, such as, for example, the number of performance credits needed for each yote.

I heartily recommend, however, that each member read carefully the proposed Consent Order and the documents filed therewith, as well as my explanatory memorandum sent to each member on July 21, 1959.

I further urge all members to bring any questions remaining unanswered to the attention of the Society well in advance of the hearing in October. We will do our best to answer you.

As you can see, I sincerely believe that the provisions contained in the proposed Order and related documents, if approved by the Court, will serve the best interests of the entire Society and the membership at large.

In an organization with relationships as complex as those here present, someone will always feel that certain rules or regulations may work to his detriment, or that they ought to be changed in some respect which, at first, may seem to be very minor.

However, the proposed Consent Order and the related documents are carefully integrated parts—the warp and

woof-of a single fabric of relationships;

Any one change may thus disturb the balance of these relationships. It may also require several further changes in order to preserve certain equitable principles sought to be served by the Consent Order, to which changes other members may not agree.

Thus, given the difficult problems posed by the Department of Justice, I think that the solutions represented by these provisions are on the whole fair and equitable.

[fol. 236pp]' I also think the removal of the threat of major anti-trust litigation will permit the Society to function even more effectively and more harmoniously in the future than it has to date.

By accepting this decree we know that ASCAP will be kept alive as a continuing and united Society working in the best interests of all of its members.

In a complex situation such as this, compromise to some extent is always necessary. I have advised the Board that in my judgment a more satisfactory solution from the point of view of the Society's best interests probably could not be attained through litigation, although this is always a possibility.

Therefore, the Board of Directors, after extended in vestigation and the most serious discussion, and with the advice of counsel, has unanimously approved the proposed Order and it unanimously recommends that the necessary amendments to the Articles of Association be approved by the general membership.

In my negotiations with the Department of Justice and in my advice to the Board of Directors with respect to this proposed Consent Order, I have tried to represent the interests of all of the members of the Society, and to consider and balance their different interests.

I wish to express at this time to President Adams, his predecessor Paul Cunningham, Herman Finkelstein, general attorney of the Society, and to the Board of Directors

and to the Society generally, my pleasure in serving the Society in this most interesting and complex matter.

I also wish to thank the staff, the Society's general counsel, Messrs. Schwartz and Froehlich, and the Society's Washington counsel, Messrs. Cox. Langford, Stoddard and Cutler, for their unfailing co-operation.

Thank you very much.

fol. 236qq !

APPENDIX

Hypothetical Examples Prepared to Guide Members in Calculating Classification Increases and Decreases in the Average Performance and Recognized Works Performance Funds.

The following examples illustrate how the provisions for classification increases and decreases in the Average Performance and Recognized Works Performance Funds would operate in four hypothetical situations.

The column "Actual Performance Credit Average" shows the classification points which the hypothetical member would have, based on his assumed five your average performance credits, if there were no limitations on classification increases or decreases.

The column "Classification" shows the point classification assigned to the hypothetical member in the Sustained Performance Fund in 1958, and the point classification that would be assigned to him in the Average Performance. Fund in 1959 and thereafter, based upon his assumed latest five-year average of performance credits and taking into account the limitations on classification increases and decreases.

The column "Computation" shows how the new point classification would be computed each year on the facts assumed in the examples.

Each member has his own records and knows his own actual facts, which presumably will be different from the facts assumed in the examples. The hypothetical examples may facilitate calculation by an individual member of how

the proposed plan would affect him. They are not actual cases.

[fol. 236rr]

		The second secon	
	Actual Performance		
Example A	Credit Average	(Tassification	Computation .
1958	·	450°	
1959	350	425	450 - 25 == 425
1960	350	400	425 - 25 = 400
1961	350	375	400 - 25 = 375
1962	350	350	375 - 25 = 350

Explanation: A point decrease between a 1958 Sustained Performance classification and a 1959 Average Performance classification (or between a 1958 Availability classification and a 1959 Recognized Works Performance classification) would be spread evenly over four years.

Example B	Actual Performance Credit Average	Classification	Computation
1958		450°	
1959	450	450	r
1960	300	400	-450 - 50 = 400
1961	350	375	400 - 50 + 25 = 375
1962	350	350	375 - 50 + 25 = 350

EXPLANATION: Except for decreases between 1958 and 1959 classifications, all point decreases are spread evenly over three years. Except for increases entitling a writer member to a classification of 1,000 or above, all point increases are spread evenly over two years.

^{• 1958} Sustained Performance (or Availability) classification.

Example C	Actual Performance • Credit Average	Computation		Classi	fication	•
. 1958		.450*		<u>.</u>	ı	
1959	350	425	450	- 25		=425
1960	400	425		25		
1961	450	450		- 25 -		120
1962	500	475	450	<u> </u>		= 450
1963	500	500	475			= 475 $= 500$

Explanation: Point increase and decrease "carry forwards" are applied cumulatively and concurrently. For example, a portion of a 1959 decrease is applied at the same time as a portion of a 1960 increase.

Example D	Actual Performance Credit Average	Classification	Computation
1958		1,000	
1959	1,000	1,000	
1960 a	900	950	975 - 25 = 950
1961	900	925	950 - 25 = 925
1962	900	900	925 - 25 = 900
1963	1,000	1,000	(No,limitation)

Explanation: There are no limitations on increases to Class 1,000 or above or on decreases from Class 1,000 or above to Class 975.

^{• 1958} Sustained Performance (or Availability) classification.

Note: The above examples apply equally to the Average Performance and Recognized Works Performance Funds. The singly difference between the computations for the two funds is that the performance credit average used for classification in the Recognized Works Performance Fund includes only credits attributable to surveyed performances occurring after the expiration of four quarters commencing with the quarter in which a performance of any given work is first recorded in the Society's survey.

[fol. 237]

EXHIBIT "B" TO AFFIDAVIT

MUrray Hill 8-8800 Cable Address: ASCAP, New York

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

575 Madison Avenue New York 22, New York

STANLEY ADAMS
President

September 4, 1959

To All Members of the Society:

At the New York meeting, which was held on August 27, 1959, Mr. Arthur H. Dean, special counsel to the Society, addressed the meeting with respect to the proposed Consent Order which will be submitted to Chief Judge Ryan on October 19, 1959.

Because there are some additions and changes from his West Coast speech (particularly on pages 28 to 30, and 36 to 37) and because of the importance of the subject matter. Mr. Dean's speech in New York has also been printed and a copy is being sent herewith to all of the members of the Society.

Sincerely yours,

STANLEY ADAMS, President

[fol. 237a]

REMARKS OF MR. ARTHUR H. DEAN AT THE NEW YORK MEETING OF ASCAP ON . . AUGUST 27, 1959

President Adams and ladies and gentlemen of ASCAP:

We are met to-day to discuss the proposed Court Orderand the other documents previously sent to members with respect to certain proposed amendments to the existing anti-trust consent decree.

As artists contributing to the great cultural values of the nation, I salute you.

When I was retained by the Society last summer, it soon became apparent that we should explore with the Department of Justice whether the questions raised by the Department could be resolved by agreement rather than by expensive litigation. This is always the duty of counsel.

A trial of these issues would have been very lengthy and expensive. Moreover, its outcome would have been difficult to predict because of the many serious anti-trust problems posed by the fact that ASCAP represents thousands of independent and competing writers and publishers.

The previous consent decrees entered under the antitrust laws between the Government and ASCAP in 1941

and 1950 imposed many restrictions on the Society.

They have also served, in a certain sense, as charters which spelled out the broad areas in which, as a practical matter; the Society could operate thereunder, under the watchful eye of the Court, without fear of allegations of violation of the anti-trust laws generally from the Department of Justice.

I am going to try to make this as non-legal as possible, but let me be legal for just a moment and read to you from Section XVII of the 1950 Decree, which governs these Court proceedings:

"Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Amended [fol. 237b] Final Judgment to make application to the Court for such further order and directions as may be necessary or appropriate in relation to the construction of or carrying out of this Judgment, for the modification thereof, for the enforcement of compliance therewith and for the panishment of violations thereof.

"It is expressly understood, in addition to the foregoing, that the plaintiff [the U.S. Government] may, upon reasonable notice, at any time after five years from the date of entry of this Amended Final Judgment [March, 1950] apply to this Court for the vacation of such Judgment, or its modification of any respect, including the dissolution of ASCAP."

You will see that our task as your counsel was to try to convince the Department of Justice not to make such an application to the Court until we had had an opportunity to confer with them. Originally, the Department proposed to file an application to the Court around Labor Day last year.

In our first discussions with the Department of Justice lawyers, they contended that the 1950 consent decree, or ASCAP under it, did not adequately safeguard competition among the members of the Society in the writing and publishing of songs.

They claimed, for example, that the 1950 decree, or ASCAP under it, did not properly allocate, among the members, the revenues of the Society and the votes in the So-

ciety.

The Board of Directors of ASCAP and the Society's attorneys took issue with many of the Department's contentions. Nevertheless, we hoped that a satisfactory agreement could be made with the Government without jeopardizing the fundamental values of ASCAP and its great cultural benefit to the nation, or the basic principles served by

its practices and policies.

[fol. 237c] After almost a year filled with many conferences between the Department of Justice and ASCAP attorneys, as well as a very careful review of ASCAP's practices and policies by its own Board of Directors, its management and its counsel, a proposed Consent Order and certain related documents were filed on June 29, 1959, in the Federal District Court in New York City, and a hearing was set for October 19, 1959, before Chief Judge Ryan.

Copies of the proposed Consent Order and the proposed distribution formulae and weighting rules were sent to all

of the members last month:

There was also sent to you a memorandum I prepared describing, I hope simply and concisely, how the Consent

Order would affect the Society's members.

One reason why the negotiations with the Department of Justice were so time-consuming was the fact—which was not surprising—that the Department, with its manifold duties, was not familian with all of the details of the very specialized problems of ASCAP. This was true both with respect to ASCAP's unique position in the entertainment

field and with respect to the relations between ASCAP and its members.

Only through long discussions, which were directed for the most part at acquainting the Department lawyers with these problems, were your Society's attorneys able to find acceptable solutions to the issues raised by the Department. This was possible because, in the final analysis, the Department shared the common desire to frame a Consent Order that would be consistent with the success of the entire Society and in the best interests of the general membership and of the general public.

I should now like to go through the proposed Order with you, attempting to explain the meaning of its lengthy provisions, the objections of the Department that gave rise [fol. 237d] to those provisions, and the ways in which those provisions will require changes in the Society's rules and

practices.

In addition, I will attempt to describe the theories underlying certain of those provisions which, on first reading, may not be clear to some of you. But they ought to be clear and I am delighted that you have taken the time and trouble to come and listen to the proposed changes.

Now this is going to be long and perhaps a bit tedious. But it affects your rights and I know of no other way to

do it.

I propose to take up the proposed Consent Order, page by page, which has the distinct advantage of order and of not skipping around and possibly missing something, but the disadvantage of not taking up the most important provisions first.

I. RESIGNING MEMBERS.

First let me take up resigning members. The first section of the Consent Order relates to the treatment of resigning members whose works continue to be licensed by ASCAP.

It is the present practice of the Society to make distributions to former publishers only out of the Current Performance Fund (55%) and to make distributions to former writers only out of the Current Performance Fund (20%)

and the Sustained Performance Fund (30%), for performances of their works under licenses in effect at the time

of their resignation.

Technically, this rule applies only to monies received from radio and TV licensees, for the distributions of the much smaller revenues from other licensees such as hotels and restaurants are "phased out" within one year after resignation on the basis of 100% "parity" for the first quarter after resignation, 75% for the second quarter, 50% for the third quarter, and 25% for the fourth quarter.

[fol. 237e] After the expiration of licenses in effect at the time of a member's resignation, under the current practice it would be possible to make no further distributions to that member although (1) his works might continue thereafter to be licensed by the Society under grants from the publisher or co-writer of such works, and (2) the resigning member had not purported to grant performing rights for the subsequent period to another licensing agency.

The Department of Justice lawyers contended that this possible treatment of such resigning members tends to restrict a member's freedom (1) to leave ASCAP and (2) his freedom to license his works through a competing

organization.

The Department claimed that the existing rules prevent a member (1) from taking his works out of ASCAP or (2) from receiving adequate compensation for their performances after his resignation, even though the Society continues to license them as part of its repertory.

We have tried to deal with this fairly

Thus, Section I of the proposed Consent Order provides that a resigning member shall continue to receive distributions on the same basis as an active member of the Society. This is true so long as his works continue to be licensed by ASCAP and by no other performing rights organization, either (a) under licenses in effect at the time of his resignation or (b) under licenses made after resignation but while the publisher or co-writer of the works in question continues to license such works through ASCAP.

There is, however, one qualification on this provision: The Society, at its option, may require that resigning members receive distribution solely on a 100% current performance basis. But if the Society exercises this option it must do so in the same way with respect to all resigning members:

[fol. 237f] II. THE SURVEY.

· Now let me turn to the proposed survey.

Section 11 of the proposed Order concerns the new survey of performances of musical compositions by licensees of ASCAP.

ASCAP at present obtains a census of all music performances of network radio and television programs presented by CBS, NBC and ABC, which furnish ASCAP with reports thereof. In addition, ASCAP samples each day, by use of tape recorders located in 22 major metropolitan cities, a three-hour period of radio broadcasting by a station, selected randomly and in non-biased fashion, located in each of these areas, and samples a similar period of television presentation by randomly selected stations located in those areas.

ASCAP also receives three-hour tapes of local radio broadcasts from approximately 14 roving financial auditors who take daily tapes of radio stations located throughout the country in areas other than those represented by the 22 fixed locations. The tapes of local TV programs are supplemented by local film programs selected randomly from the "TV Guide" publications. The musical content of these films is obtained from film "cue sheets" which are available to ASCAP.

The Department contended, however, (1) that the local survey comprised too small a percentage of the total locally-emanating programs, (2) that the survey was not based on scientifically accepted principles of sampling design and control, and (3) that the monies received by ASCAP from the various major media such as (a) network radio, (b) network TV, (c) local radio and (d) local TV, were not being distributed in proportion to the performances in those media.

[fol. 237g]. Specifically, the Department said that the Society was giving too much weight to radio and TV network performances and too little to local station performances.

film reports will be used for the distribution of French and German non-film revenue, and added as a basis for distributing foreign non-film revenues generally.

At the present time no other country making a significant contribution to ASCAP furnishes reports that could be economically used as the basis for distributing its reve-

nue.

If, in the future, the Society receives \$200,000 a year or more from any country that provides adequate and comprehensible reports, ASCAP will endeavor to use those reports to the extent reasonably possible.

D. WEIGHTING RULES, PRESENT AND PROPOSED.

Next, let me discuss the present and the proposed Weighting Rules.

1. The Present Rules. At the present time, when a performance of an ASCAP composition is picked up in the survey, it is given an initial value through reference to the "Weighting Rules."

The basic unit of measurement under these rules is a

"performance credit.". .

[fol. 237x] Each feature use of an ASCAP work, except public domain arrangements and certain serious works, is awarded one performance credit, multiplied by the number 20 in the case of locally-emanating performances and, in the case of commercial network performances, by the number of stations carrying the program in question.

A further multiple of 3 is then applied if the surveyed performance was on television rather than radio. This was done in an attempt to correlate the number of performance credits generated by the two media with the relative

amounts of ASCAP revenue from those media.

In 1957, for example, 52% of ASCAP's revenue came from television and 36% from radio. On the other hand, television would have accounted for only 30% of the combined radio-television performance credits, if performances on both media were treated alike.

The multiple of 3 for television credits was an attempt to restore the balance between performance credits and revenue received from the two media, with the result that

Now, ASCAP was as anxious as the Department to set up a sound and workable survey on which to base its reve-

nue distribution. What to do?

At my suggestion, Dr. Joel Dean of Columbia University, who, let me be clear, is no relative of mine, was engaged approximately a year ago to design and set up a new survey which would operate on a scientifically designed and conducted basis.

This complex task is now nearing completion.

It is not feasible to attempt to discuss the many mathematical refinements of the proposed survey. However, its salient features can be briefly and simply outlined.

(1) The Society will continue to obtain logs of all programs on the three major TV networks and all commercial programs on the CBS and NBC radio networks.

Radio network sustaining programs will be covered by the local survey and will receive appropriate credit when picked up in the local survey;

- (2) The local radio survey will be enlarged by over 50% of its present size;
- (3) The number of performance credits awarded for performances on the four major media surveyed, i.e., local radio, local TV, network radio and network TV, will be properly computed so that the number of performance credits each of those four media generates will approximate the proportion of the total ASCAP revenue attributable to each of those media; and

[fol. 237h] (4) The selection of sample tapes in the local survey will be based on a so-called scientific basis, which the experts call "random". The word "random" is not used in this context with its conventional meaning. Rather, it connotes a mathematical method of sampling selection that is wholly devoid of any bias, discrimination or "built-in" or personal objectives that might tend to favor one station or program over another.

The actual programs to be surveyed will be selected in accordance with mathematical tables similar to those com-

monly used for industrial sampling.

561/2% of the credits went to television performances and

421/2% to radio performances.

These figures change from time to time and will be under review by the independent expert to be appointed by the Court.

Non-feature uses, i.e., as a theme or jingle or as background, one or bridge music, have been awarded fractional credit unless the work so used had previously accumulated substantial performance credits, thereby generally indicating its wide recognition or associative value for the audience of the user.

Credit for these non-feature uses ranges from 1% to 100% credit, depending upon the prior history of the work so used. This disparity in credit was one of the things which the Department of Justice criticized.

[fol. 237y]. Music with no substantial prior history of performance is awarded credit on a time basis when used as background music, i.e., 20% credit for each three minutes

thereof.

Music lacking a history of substantial prior performances have been awarded 1/10 of 1% credit when performed as non-feature music by less than four instruments. This was done in order to prevent a disproportionate allocation of royalties for such uses of unknown works when performed by organists or pianists on off-recurring programs such as daytime dramatic sgrials.

Multiple performances of the same work on the same program are given 10% of the otherwise applicable credit for each subsequent performance after the first one on that

program.

Serious works requiring four minutes or more for a single complete rendition are given extra durational credit when performed for four minutes or more.

Copyrighted arrangements of works otherwise in the public domain receive from 20% to 100% credit depending upon the amount of original material contained therein.

2. The Proposed Formula

I now turn to the proposed new Weighting Formula.

The Board and counsel believe that the weighting principle is fundamental to the essential philosophy of ASCAP. The significance of a "random" sample is that the probability or chance of picking up a performance on any given station or group of stations sampled is known, depending upon the depth or frequency of sampling with which the station or stations are sampled. No subjective, that is, personal or individual, considerations would be permitted to influence the selection of tapes, since that selection would be centrally controlled by an independent survey expert.

Now, if (1) the probability of surveying a given performance is known and if (2) the amount of ASCAP revenue attributable to the emanating station is known, then it is possible to multiply the surveyed performance by proper scientific multipliers that will take into account both of

these factors.

Thus, a given surveyed performance will first be "blownup" or multiplied to reflect the sampling frequency with

which the particular station is sampled.

For example, if, on the average, one out of every 100 broadcasting hours of a station is sampled, a surveyed performance on that station would first be multiplied by 100. For purposes of sampling efficiency, stations within certain revenue-producing ranges will be grouped together for similar sampling treatment.

[fol. 237i] In addition to this sampling "blow-up" multiplier, each surveyed performance will be multiplied by an economic factor designed to reflect the differences in revenue contribution to ASCAP by the various stations sampled. Again, for the purpose of applying this economic multiplier, stations will be grouped into broad economic bands, for example, stations paying ASCAP from \$5,001

to \$10,000 a year, etc., will be treated alike.

Lastly, the combined product of these two multipliers—the sampling "blow-up" and the economic multipliers—will be further multiplied by arithmetical factors designed (1) to produce approximately 25,000,000 total ASCAP performance credits per year and (2) to allocate the performance credits attributable to the four major media sampled, i.e., (a) network TV, (b) local TV, (c) network radio and (d) local radio, in approximate proportion to the relative share of ASCAP income generated by each of those media.

Within each major medium the combined multipliers that I have mentioned will also produce an allocation of performance credits—the unit of measurement of the results of the survey—approximately in line with the revenue contribution of the various groups of stations sampled.

Thus, if a group of stations contributes 1% of ASCAP's local radio money, they will generate approximately 1% of

the local radio credits.

The application of these principles does not mean that a single surveyed performance on a very large station will necessarily receive more credits than a surveyed perform-

ance on a very small station.

The Society, in general, will recognize the differences in license fees from various stations by taking more tapes from the big station than from the small. Therefore, although the economic multiplier for the large station may be, for example, ten times that for the small, the sampling "blow-up" multiplier for the small station may be ten times [fol. 237j] that for the large, and hence these two multipliers, when combined to produce a final arithmetical multiplier, would "cancel out" with the result that each of the two performances would ultimately be treated in approximately the same way.

Of course, in some instances there will be differences in the number of credits awarded to two similar performances on two stations of different size. But in the great majority of cases the credits awarded to similar performances on different local stations will fall within a fairly narrow

range.

Because of the complicated interplay of statistical, economic and other "blow-up" factors needed to produce an estimated 25,000,000 total performance credits per year by the application of scientific sampling principles, the final arithmetical multipliers still remain to be worked out by an independent expert.

The proposed Consent Order also provides that an additional independent outside expert will be appointed by the Court to review the design and operation of the survey and to comment on its size, scope and accuracy to the Court, the Department of Justice, and ASCAP. In the event that the

Department seeks to have the size of the survey increased at some future date, the Society can submit evidence to the Court as to the cost of any recommended increase.

The point is that the survey must be fair.

III. THE DISTRIBUTION FORMULAE AND WEIGHTING RULES.

. I now turn to Section III of the proposed Consent Order, which concerns the distribution of the Society's 'revenues among its members. For most of the members, this is probably the most significant part of the proposed Order.

It affects your pocketbook and that is a vital nerve.

[fol. 237k] The Department of Justice contended that under the existing distribution plans, seniority of membership, age of composition, and the length of the period of averaging performance credits, were emphasized to such a degree that the writing and publishing of new songs by young writers and new publishers may be discouraged. If so, this would be against the public interest.

In addition, on the writers' side, the Department said that the carry-over effects of the pre-1950 classifications still dictated, to a substantial extent, the amount of distri-

bution to many of the older writer members.

A great deal of time was spent with Department officials 'explaining the peculiar hazards and risks of the songwriting profession and the music publishing business, which you all know better than I, and the efforts' that have been made by ASCAP to eliminate some of the "feast or famine" elements by such principles as "averaging".

The reasons for "seniority" and "availability" in ASCAP's distribution system were likewise explained at length. In part, the "seniority" principle recognizes that the Society was built to its present strength largely by members who received little return until fairly recent times; in further part, it served as a form of averaging over the long term.

The principle of confinued "availability" recognized the added value to the Society's catalog, as a part of the ASCAP licensing package, of musical compositions which had firmly established their importance to the Society's licensees and thus contributed very importantly to the

Society's revenues.

peared, and if the work has not earned the required number of performance credits within its first two years, the burden would be on the member to establish that performance credits recorded for his work between 1943 and 1955 reflected feature performances. Of course, let me be clear, the records of the Society would be open to a member for that purpose.

For purposes of this talk, I asked the staff of ASCAP to check the 377 songs in which the publisher members of the Board of Directors had an interest in April, 1958, and which, under the present rules, have received credit as fully qualifying works when used as themes.

My purpose was to use these songs as an example with respect to the part of the proposed qualifying test which requires that a song have accumulated 20,000 feature performance credits if it is to receive full credit as a qualifying work when used as a theme.

323 of the above-mentioned 377 works were first performed before January 1, 1943. Actual performance credits prior to January 1, 1943 under the new proposed rules are disregarded because of the inadequacy of the Society's records in those earlier years. However, 250 of those songs would satisfy the 20,000 feature performance credit test under the proposed rules because they appear in "Variety Music Cavalcade" or among the top ten on the "Lucky Strike Hit Parade", or among the top ten on the lists of most popular songs in Variety or Billboard.

Each of the remaining 73 of these 323 songs first performed before January 1, 1943 has received over 20,000 performance credits since it first appeared in the survey. However, for any of these 73 songs to satisfy the 20,000 feature performance credit requirement, such credits must have been received after Jan-

uary 1, 1943.

[fol. 237cc] The remaining 54 songs checked were first performed after January 1, 1943. 31 of them received 20,000 performance credits during the first two years after their first performance. Therefore, the rules provide a presumption that such credits were for feature uses.

In addition, the Society pointed out that in many music uses, such as for theme and background music, generally speaking the value to the user of a well-known and well-established work far exceeds that of an unknown work that might be used as theme or background music. And this is [fol. 2371] for the reason that an audience, for the most part, immediately recognizes a well-known work and it automatically evokes certain fond or pleasant memories or associations which are of value to the user, who is willing to pay accordingly.

With respect to distribution generally, the Department argued that each member, whether a writer or a publisher, and without distinction between members, should receive—without any restriction—distribution solely on the basis of the Society's most recent performance records. If this were required, it would destroy ASCAP as we know it.

These two positions were reconciled by giving both writers and publishers an option either (1) to receive distribution solely on the basis of current performance credits or (2) to continue to receive distribution under plans essentially comparable to those now in effect.

I should like now to describe first the writers' distribution formula, and then to turn to the publishers' distribution formula.

A. WRITERS' DISTRIBUTION FORMULA, PRESENT AND PROPOSED.

1. The Present System. As you know, 50% of the net distributable revenue of the Society is paid to the writer members and 50% to the publisher members.

The Writers' distributable revenue is now divided into four funds: (1) The Current Performance Fund (20%); (2) The Sustained Performance Fund (30%); (3) The Availability Fund (30%); and (4) The Accumulated Earnings Fund (20%).

a. The Current Performance Fund (20%). Distribution from the Current Performance Fund is based solely on the current performance credits received by

Under the proposed rules, the 20,000 feature performance credit requirement is geared to a year when the total of all performance credits of all members of ASCAP was approximately 25 million. This feature performance requirement is subject to proportionate adjustments for years when the total performance credits of all members was less than 20 million or more than 30 million.

Three additional songs, among those checked, had 20,000 adjusted performance credits in their first two years, and, therefore, will receive the benefit of the presumption that such credits were for feature uses.

Three additional songs appeared in Variety Music Cavalcade or the other lists which I have mentioned. Therefore, the 20,000 or more performance credits which each of them received between January 1, 1943 and October 1, 1955 will have the benefit of the presumption that such credits were for feature uses.

Each of the remaining 17 songs checked, out of the 377 in which the publisher members of the Board of Directors had an interest, had 20,000 performance credits before being used as a theme. But as these 17 songs did not meet any of the foregoing special tests, the burden would be on the member to show that their performance credits received between January 1, 1943 and October 1, 1955 were for feature uses.

After October 1, 1955, the records of the Society indicate which performance credits were fer feature [fol. 237dd] uses. After that date, the complications I have been discussing disappear.

For your information, the Society has been surveying all radio network performances since 1936, by use of logs furnished by the networks. A similar survey of television network performances was started in 1949.

A sample survey has been conducted of local radio programs since 1950, and of local television programs since 1951. The local surveys have been conducted by taking tape recordings of sample programs, supplemented in the case of local television by the use of "TV Guide" and film "cue sheets". In addition, the

[fol. 237in] a writer member during the latest available fiscal survey year, each writer member sharing in the Fund in direct proportion to his current performance credits.

b. The Sustained Performance Fund (30%). Distribution from the Sustained Performance Fund is based upon the average number of performance credits, received by each writer member during the preceding five or ten years, at his option, subject to certain mathematical limitations on the rate of promotion or demotion in his standing in this Fund.

At the inception of the Sustained Performance Fund in 1950, the classifications of the writer members prior to that date were used as the initial basis for computing their standings in this Fund. Since that time, all classification movements by the writer members have been determined solely upon the basis of performances surveyed by the Society during the preceding five or ten years.

ASCAP annually calculates each writer member's classification, a point rating. Each such member then shares in the Fund quarterly on the basis of his points as a fraction of all Sustained Performance points of all writer members.

c. The Availability Fund (30%). Since 1952, the Availability Fund has been distributed on the same mathematical basis; as the Sustained Performance Fund, except that there are more restrictions on classification movements in the Availability Fund than in the Sustained Performance Fund.

In addition, before the value of classification points in this Fund is computed, up to \$50,000 per quarter may be deducted from this Fund for special awards to writers of works having a unique prestige value or works performed in media not surveyed by the Society.

[fol. 237n] d. The Accumulated Earnings Fund (20%). A writer's participation in the Accumulated Earnings Fund is computed by multiplying the average of his Sustained Performance and Availability classifications by the quarters of his continuous membership in ASCAP. In this way there is obtained his Accumulated Earnings points, which determine his share of this Fund.

2. The Proposed System.

a. Current Performance Option. Now let me turn to the proposed system. Under the proposed Order, * any writer member would be permitted to elect to . receive payments solely on the basis of current performance credits earned in the prior fiscal survey year, except that if the writers classified at 975 points— 39,000 performance credits divided by 40 = 975—and above 975—currently the top approximately 100 writer members in ASCAP—vote in a special election to be held for that purpose, to withhold from themselves the current performance option, then the current performance option would be applicable only to the first 39,000 annual performance credits of an electing writer, or the lowest number of average performance credits of any writer from whom the option is withheld, if that lowest number should be higher than 39,000.

For credits earned in excess of such number, a writer electing the current performance option will be paid on the basis of the four-fund system. That is, such a writer would share in the 20% Current Performance Fund on the basis of all credits received by him; in addition, he would be given rankings in the other three funds as if his one-year total were a five-year average but those rankings would then be reduced by 975 points; this is the value represented by the credits for [fol. 2370] which he would be paid on the current performance option basis.

Approximately the top 100 writer members will be given an opportunity to decide for themselves as a group, by a majority vote of such writers, to withhold the current performance option from these 100 writer members.

For the purpose of this vote a majority shall require both (1) a majority of those writers who vote in such election and (2) writers who together hold a majority of the total average performance credits of all those writers who vote in such election.

In the event that the top writers vote to withhold the current performance option from themselves, another such election to determine whether they wish to continue withholding the option may be called at the end of three years by a petition signed by either (1) 25 in number, or by 25% of such top writer members, the percentage to be computed on either a member of an average credit basis, or (2) by the Department of Justice.

The theory underlying this provision of the proposed Order is that the writers with the most performance credits in ASCAP should, if they wish, be permitted the opportunity to continue their present practice of receiving considerably less money per performance credit than do those writers whose works have received fewer performance credits. The result is that the amounts so withheld from the writers with the most performance credits are pro-rated among the other writer members with fewer performance credits, thereby appreciably benefiting the majority of the writer members, and thus helping to promote the Society and the songwriting profession as a whole.

[fol. 237p] Under the proposed Order, a writer would be permitted to elect the current performance option

for any subsequent survey year.

But, having so elected, he would for bookkeeping reasons be initially bound to that option for two years. If he later returned to the four-fund system, and thereafter again chose the option within the next five years, he would then be bound to the current performance option for five years.

A writer member who elects the current performance option may thus return to the four-fund system. In that event, however, he receives no credit in the Membership Continuity Fund for the period of his current performance election in which his current performance credits did not exceed 39,000 or such higher number as already described.

For purposes of computations for the Average Performance and Recognized Works Performance Funds, a writer cancelling his current performance election will have his performance credits, if any, for the years next prior to his election credited as if they were received in the years immediately preceding his return to the four-fund system.

b. The Four-Fund System. For those writers who continue to receive payment on the four-fund system, several changes would be made in that plan.

Let me outline them as follows:

- (1) The Current Performance Fund (20%) would continue in the same form as it is today.
- (2) The Average Performance Fund (30%) would replace the present Sustained Performance Fund and would operate in essentially the same fashion, i.e., on the basis of the most recent five-year performance credit average of each writer member. [fol. 237q] To meet the views of the Department of Justice, two significant changes would be made in that Fund, however; (1) writers would not be permitted to elect a ten-year rather than a five-year average, and (2) (a) classification increases based on the most recent available five-year averages would be spread over a two-year period and (b) decreases would be spread over a three-year period, rather than according to the complicated mathematical limitations on classification movements now in effect.

Please note the hypothetical examples set forth in the Appendix hereto which, although not part of the oral remarks, are furnished as a guide which members may find helpful in seeing how classification increases and decreases would be calculated under the new plan.

(3) The Availability Fund (30%) would be replaced by the Recognized Works Performance Fund, which would be distributed on the same basis as

the Average Performance Fund, except that payment out of this Fund would be limited to credits received by works performed at least four quarters

after their first surveyed performance.

The basic theory underlying the Recognized Works Performance Fund is that songs become more valuable to the user as they demonstrate the durability of their public acceptance. It is firmly believed by the Board of Directors and counsel as a fundamental principle of ASCAP that those songs which are performed long after their initial "plug" period contribute more overall to the continued value of the Society's catalog than do brand new works that may be performed a comparable number of times during the same survey year.

[fol. 237r] Because of the special place of fond memories or pleasant recollections that well-known and established songs hold in the minds and hearts of an audience, it is believed that their value cannot be equated on a straight one-for-one performance basis with compositions that have not yet attained comparable recognition stature with listeners or viewers of

all ages and different economic means.

Thus, time and again in the negotiations with the ASCAP licensees, it has been emphasized in one way or another that the key bargaining assets of the Society with the users, which their directors can utilize as they see fit, are its standard songs and established catalogs and their continued availability.

The Recognized Works Performance Fund would recognize this added contribution by compensating, in that Fund, only for performances of songs that had demonstrated a degree of sustained public rec-

ognition and demand.

Without this Fund, there would be no distinction in the credit awarded to different songs, except for the Weighting Rules, despite the very real differences in value to the user that exist between transitory "hits" and works of lasting public acceptance.

Of course, writers classified below 975, or those classified in 975 and above may elect in the special

election, to be paid on a 100% current performance basis. They may thus avoid being subject to the application of the Recognized Works Fund.

- (4) The Membership Continuity Fund (20%), would replace the Accumulated Earnings Fund (20%). It would be distributed on the basis of (a) a member's continuous quarters of membership, not to exceed 42 years, and (b) the member's Average Performance Fund rating, rather than, as at present, [fol. 237s] on the basis of the average of his Sustained Performance and Availability ratings.
- (5) Before any distributions are made to the writer members under the current performance option of the four-fund plan, up to 5% of the writers' distributable revenue can be deducted for the purpose of making awards for works of unique prestiguation of the works substantially performed in media not surveyed by ASCAP.

Awards under this provision will be made by an independent panel of experts and will be announced by the Society to all writer members in advance of payment. Now, some members may dislike the publicity but, on the theory of the right of the public to know, it permits any member who believes that he has been overlooked or that the awards are inadequate or improper in any respect, to apprise the Society of his views.

The Department has agreed that the Writers' Distribution Formula which I have just outlined complies with the proposed Order.

The proposed Order itself requires that at least 20% be distributed on the basis of current performances and at least 30% on the basis of average performance credits.

The Order further requires, and I call your specific attention to the change in wording, that not more than 30% be distributed on the basis of performances of Recognized Works and not more than 20% on a basis which includes continuity of membership.

The over-all Writers' Distribution Formula, consisting of the inter-related Four Funds and the Current Performance Option, have been given the most serious considera-[fol. 237t] tion by your Board of Directors and counsel. It may not be amended by the Society itself without 30 days' prior written notice to the Department, and any amendments would have to conform to the proposed Order. Changes cannot be made in one fund without affecting the inter-related parts and consequently the rights of individual members. No proposed change can therefore be considered alone.

B. Publishers' Distribution Formula,
Present and Proposed.

Now let me turn to the Publishers' Distribution Formula.

- 1. The Present System. Let me take up first the present system. The publishers' distributable revenue is divided into three funds: (1) The Current Performance Fund (55%), (2) The Availability Fund (30%), and (3) The Seniority Fund (15%).
 - a. The Current Performance Fund (55%). The Current Performance Fund is distributed on the same basis as the Writers' Current Performance Fund, i.e., the number of current performance credits received by each publisher during the latest available fiscal survey year determines the extent of its participation.
 - b. The Availability Fund (30%). The Availability Fund is distributed on the basis of a five-year accumulation of performance credits attributable to performances of works that were picked up in the Society's survey two years prior to such performances, i.e., compositions that have demonstrated a substantial degree of durable public acceptance.
 - c. The Seniority Fund (15%). Participation in the Seniority Fund is determined by multiplying the number of performance credits earned by each publisher member during the latest available five fiscal survey [fol. 237u] years by the number of quarters that such publisher has been a member of ASCAP.

2. The Proposed System.

Now, let me explain the proposed Publisher's Distribution Formula.

a. The Current Performance Option. The publishers, like the writers, will also have the opportunity of electing to receive distributions solely on a current

performance basis.

However, inasmuch as the publishers will lose their seniority ratings over a five-year period, and unlike the writers, will not have the right to elect a five-year average, in order to avoid sharp initial dislocations of income which many publishers have relied on in the past, this option will be graduated over a period of five years on the following basis:

For the first applicable fiscal survey year, an electing publisher would receive 75% of the amount to which he would be entitled if all publishers were on a current performance basis. For the second year, 80%, and so on until after five years, i.e., in 1964, any publisher electing the current performance basis of distribution would be entitled to 100% of the amount he would get if every publisher were paid solely on a current performance basis.

Alternatively, a publisher can continue on the regularplan for several years and then move over to a current performance basis, at that time receiving whatever the applicable percentage may be for that year on the current performance side. Once, however, a publisher shifts to the current performance basis, he will continue to receive payment under that system.

- b. The Three-Fund System. For those publishers preferring not to receive distribution solely on the basis [fol. 237v] of current performances, several significant changes will be made from the existing system:
 - (i) The Current Performance Fund (55%) will remain the same.
 - (ii) However, the Availability Fund (30%) will be replaced by the Recognized Works Performance Fund and payment therefrom will be on the basis

of credits earned during the preceding fiscal survey year, rather than during the five preceding years, by songs at least one year old—in terms of performance—rather than two years.

(iii) The Seniority Fund (15%) will be replaced by the Membership Continuity Fund. This Fund will be phased out at the rate of 3% a year, with a corresponding increase in the Current Performance Fund, so that after five years 70% of the money paid out under the regular plan will be on the basis of current performance credits and the remaining 30% will be paid out on the basis of Recognized Works.

C. Foreign Revenue.

I now turn to the question of foreign revenues.

The Department has questioned the present method of distributing the royalties which ASCAP receives from ap-

proximately 22 foreign societies.

It is the current practice of ASCAP to distribute Canadian, English and Swedish revenues on the basis of the respective reports received from those countries; these sources furnish ASCAP complete reports in usable form for distribution. All other foreign revenue is currently distributed on the basis of English and Swedish reports.

ASCAP has agreed that if the revenue from any foreign source exceeds \$200,000 per annum, and the reports furfol. 237w] nished ASCAP allocate credit in reasonably dentifiable form separately by compositions performed and indicate the members in interest, such revenue will be eparately distributed on the basis of those reports. Other oreign revenue will be distributed on the basis of the most reliable information ASCAP has as to foreign performances cenerally.

ASCAP has received more than \$200,000 per annum rom England since 1943, from France since 1952, from anada since 1953, and from West Germany since 1955. The French and German reports are in usable form, however, only with respect to non-film performances. Accordingly, it has been agreed that French and German non-

In a non-feature use, a well-known song will generally be performed only with the specific intent of projecting the content image or memory associated with that song into the format or storyline of the program. Thus, such a use is given a prominent place in the program throughout the period of its performance.

An unknown or relatively unknown composition, on the other hand, can be performed in a non-feature role with only passing or brief atmospheric effect on the audience. [fol. 237z] Under the proposed Order, the Weighting Rules applicable to credit for uses as themes, jingles, background, cue and bridge music would be substantially revised, as I shall describe later.

- a. The Qualifying Test. A new, and we think sounder, test has been developed for determining which songs will qualify for more than minimum credit when used as non-feature music. For full credit when so used a song must
 - (a) have accumulated 20,000 feature performance credits, i.e., credits not earned for theme, jingle, background, cue or bridge uses, and (b) have earned 2,500 feature performance credits during the five most recent survey years, towards which number not more than 750 can be counted in one year.

The latter requirement would be reduced proportionately for songs with less than 5 years of performance credits. In addition, 25%, 50% and 75% credit will be awarded to partially qualifying songs when used as themes and 50% credit for partially qualifying songs when used as background music.

A "Theme" is defined as a musical work used as an identifying signature of a radio or television personality or of all or part of a radio or television program or series of programs. A musical work (other than a jingle) used in conjunction with a commercial announcement shall receive the same gredit as a theme.

"Background Music" is defined as mood, atmosphere or thematic music performed as background to some non-musical subject matter being presented on a radio

or television program. A vocal or a visual instrumental rendition of a work on any medium shall not be regarded as background music regardless of the context in which performed.

[fol. 237aa] Thus, the new test has a double requirement: (1) the work must have attained a sufficient "hit" status at one time to indicate its audience recognition value and (2) it must have enjoyed some recent popularity, indicating that it is still alive in the minds

of many listeners and will invoke response.

For works first performed before 1943, when the Society began to maintain adequate records of performance credits, the 20,000 feature credit requirement could be met if the work were listed in (1) the publication "Variety Music Cavalcade", published by Prentice-Hall in 1952, (2) as one of the "top ten" hits on the "Lucky Strike Hit Parade" or (3) as one of the "top ten" on the weekly lists of the most popular songs published in Variety or (4) Billboard.

"Variety Music Cavalcade", the "Lucky Strike. Hit Parade", Variety and Billboard were selected for this purpose because, in the considered opinion of the Board of Directors and management of ASCAP, they represent the best available reference sources for ascertaining the status of works performed before 1943. Not including other references would probably be only a theoretical or academic omission because almost all "hit" songs performed before 1943 and which have received 2,500 feature performance credits in the five latest survey years are probably included in one of the lists referred to. Or, if not listed in any of them, they probably would have received 20,000 feature performance credits since 1943.

Between 1943 and 1955, the Society's records did not clearly indicate whether credits were for feature performances or for non-feature performances such as theme and background music. If a work first performed after January 1, 1943, appeared in any of the above-mentioned publications, it would be presumed that credits earned by it prior to October 1, 1955, were for [fol. 237bb] feature performances; if it has not so ap-

Society has surveyed performances by symphonic and concert licensees.

Starting January 1, 1943, dates of all performances were recorded and, when the local surveys started, performances on local radio and television were so noted. It was not until October 1, 1955, however, that the records of the Society indicate the various uses of a given performance, for example, feature use, theme, background, jingle, etc.

The records of ASCAP do not show which perform-

ances are "live" and which are recorded.

b. Credit Provisions

I turn to the credit provisions in the Weighting Formula:

(i) Feature Performance. All uses except those credited as themes, jingles, background music or cue and bridge music, as defined in Section A of the Weighting Rules, are described as "feature performances".

Each feature performance of a work, except public domain arrangements and certain serious works, [fol. 237ee] which I discuss later, will be awarded full credit, except that (a) each repeated use of the same work on a single program after the first one, will receive only one-tenth credit, with a maximum of two full credits for any single program and (b) credit will not be allowed for more than eight feature performances per quarter hour.

(ii) Themes. A "qualifying work", when used as a theme, will be awarded 100% credit, or 75% or 50% or 25% credit, depending upon its past history of feature performances, for all such uses within the first hour of any two-hour period, and one-tenth of the otherwise applicable credit for all additional such uses during the second hour.

A "non-qualifying" work used as a theme will receive 10% credit for all such uses within the first hour of any two-hour period and 1% credit for all additional such uses during the second hour.

Musical works, other than jingles, used in conjunction with a commercial announcement will receive the same credit as a theme.

(iii) Background Music. A qualifying work used as background music will receive full credit or 50% credit depending on its history of prior feature performances.

Non-qualifying works will receive 20% credit if they have been commercially published for general public distribution and sale, if commercial recordings have been plade as "singles" for general public distribution and sale, and if five feature performances of the work have been recorded in the local radio sample survey in the five preceding fiscal survey years:

For each repeated use on a single program after the first one, one-tenth of the credit provided above [fol. 237ff] will be awarded, with a maximum of two times the credit awarded for the initial performance.

Other non-qualifying background music on each program will receive, for each three minutes' duration in the aggregate for that program, 20% credit; fractions of three minutes will be computed on the basis of 5% for each 45 seconds or major fraction thereof.

(iv) Cue and Bridge Music. Let me now turn to cue and bridge music.

"Cue Music" is defined as music used on a radio or television program to introduce, but not to identify, a personality or event thereon. The term "cue music" includes, but is not limited to, introductions, "play-ons", and "play-offs".

"Bridge Music" is defined as music used on a radio or television program as a connective link be-

tween segments or portions thereof.

A qualifying work used as cue or bridge music will receive 10% credit for all uses during the first hour of any two-hour period and 1% credit for all such uses in the second hour.

A non-qualifying work will receive 1% credit for all uses during the first hour and 1/10 of 1% credit for all such uses in the second hour.

(v) Jingles. I turn now to jingles.

A "Jingle" is defined as a musical message containing commercial advertising matter, where (a) the musical material was originally written for commercial advertising purposes or (b) the performance is of a musical work, originally written for other purposes, with the lyrics changed for commercial [fol. 237gg] advertising purposes with the permission of the ASCAP member or members in interest.

Unlike the present Weighting Rules, no distinction whatsoever shall be made in credit awarded to works used as commercial jingles. Jingles will each receive 1% credit for all uses during the first hour of a two-hour period of programming and 1/10 of

1% for all uses in the second hour.

(vi) Copyrighted arrangements. The credit provisions for copyrighted arrangements have been rewritten so as to permit from 10% to 100% credit, depending upon the amount of original new material, either lyric or melodic.

(yii) Other Provisions. Other provisions of the proposed Keighting Rules permit the Society to limit the credit that may be awarded to works performed on dramatic programs 15 minutes or less in duration,

presented two or more times a week.

The Society will continue to give extra durational credit for surveyed works which require four minutes or more for a single, complete rendition thereof, and which in their original form were composed for a choral, symphonic or similar concert performance, including chamber music, when those works are actually performed for the periods of time specified.

A durational credit system was inaugurated in 1945 and assumed its present form in 1955 for local performances and in 1957 for network performances.

In addition, performances of concerts by symphony orchestras on national network sustaining programs

may be awarded credit equal to performances on a network of 50 stations. Works performed on all other radio network sustaining programs will receive credit when picked up in the local survey.

[fol. 237hh] ASCAP may also distribute to its members, for performances of their works in concert and symphony halls, amounts five times the amount of the license fees received from ASCAP's concert and symphony hall licensees.

That concludes the discussion of the Weighting Formula. But before leaving the subject of weighting, let me explain the difference between two documents which all members received.

One document, entitled "Weighting Rules", appears as Attachment C to the proposed Order itself. These general provisions govern what may be contained in any detailed weighting formula which the Society adopts, unless a revision of the Weighting Rules should be ordered by the Court.

The "Weighting Formula" which the members also received as a part of the same booklet, contains the detailed weighting provisions which the Department has agreed mitially comply with requirements of the Weighting Rules.

The Weighting Formula may not be amended by the Society without 30 days' prior written notice to the Department, and any amendments would likewise have to conform to the Weighting Rules attached to the Order itself or to a Court-ordered revision thereof.

[fol. 237ii] IV. Voting.

Let us now turn to Section IV of the proposed Consent Order, which provides for the new voting formulae, and which would substantially change the present method of allocating votes.

A. PRESENT SYSTEM.

At present, each writer member has one vote for every \$20 of annual ASCAP income and each publisher member

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has one vote for every \$500 of annual ASCAP income, with no limit on the number of votes held by any one member.

Elections for directors have been held once every two

vears.

aOf the 12 writer members of the Board of Directors, one has been a Director since 1920, two were first elected in the 1930's, two in the 1940's, and the remaining seven in the 1950's, including two in 1957 and three in 1959.

There are 12 publisher directors. Two publishers have been represented on the Board of Directors since 1914, two since 1924, one since 1938, two since 1939, one since 1947.

three since 1957 and one since 1959. (

B. PROPOSED SYSTEM.

Under the proposed Consent Order, votes would be allocated solely on the basis of performance credits earned in the preceding fiscal survey year, rather than on dollar revenue. The votes would be computed in accordance with a diminishing returns formula under which a member would have to earn progressively more credits for each additional vote.

No member—writer or publisher—would be allowed more than 100 votes.

[fol. 237jj] The new voting rules provide other significant changes:

1. If at any time there is an increase of more than 10% in the percentage of total publisher votes held by the top ten publisher members and their affiliates, the publishers voting formula must be revised to bring the votes of such publishers back within 10% of the amount which they would initially hold under the new voting formula.

The top ten publisher members and their affiliates would according to the latest available figures, initially hold about 37% of the total publisher votes; thus, the maximum which could be held by any ten publishers, including their affili-

ates, would be about 41%.

For your information, the top 50 publishers out of a total of about 1400 publisher members would, according to the latest available figures, have 2,479 out of a total of

4,908 publisher votes, or 50½% of the total. Fourteen of these publishers are affiliated with others among the top 50, so that the foregoing statistics represent 36 separate

publisher members and affiliates.

The new publishers' voting formula will reduce the voting strength of the top ten publishers and their affiliates from about 63% at present, to about 37% of the total publisher votes it will also reduce the voting strength of the top 50 publisher members from about 78% at present, to about 50% of the total publisher votes.

The twelve publisher members of the Board of Directors, including affiliated publishers, would initially have about 1,505 out of a total of 4,908 publisher votes, or slightly over 30% of the total. This is a substantial reduction from 56% of the votes under the voting system now in effect. Under the new formula, of the 12 publisher members of the Board of Directors, including affiliated companies, one would have 424 votes, one would have 393 votes, one would have 254 votes, three would have between 98 and [fol. 237kk] 111 votes, three would have between 21 and 43 votes, and three would have between three and six votes.

Note: The above figures have been recomputed since my speech in Los Angeles on August 18, 1959 and the figures vary slightly from those there given.

- 2. In any election for the Board of Directors, 25 writer members may nominate an eligible person as a writer director, and 25 publisher members may nominate an eligible person as a publisher director.
- 3. Any group of writer or publisher members representing 1/12th of all the writer or publisher votes, as the case may be, can elect one director by signing a petition in his support at least 90 days before the date of any scheduled directors' election.

In that event, the number of directors to be elected in the general election would be reduced by the number of directors elected by petition. Members who elect a director by signing such a petition naturally would be precluded from voting again in the general election.

It would take publishers with an estimated 409 votes to elect a publisher director under the above provision. This would require a varying number of publisher members. Thus, it would take 409 of the 628 publisher members who have only one vote each to elect a publisher director. On the other hand, there are four publisher members, not presently represented on the Board of Directors, who together have enough votes to elect a member of the Board of Directors under this proposal.

On the writers' side, it is estimated that there will be in excess of 15,000 eligible votes under the new system. Thus, it will take about 1,300 votes to elect a writer mem-

ber of the Board by petition.

[fol. 23711] 4. An election of directors must be held within one year after the effective date of the proposed Order, probably early in 1961. All directors shall be elected at the same time, except for those elected by petition, and the number of directors shall not be less than 24.

The voting provisions contained in the proposed Order attempt to give fair recognition to the fact that the more than 6,000 members of ASCAP make varying contributions

to the value of the available ASCAP repertory.

At the same time, however, these provisions would substantially broaden the base of present voting strength. As a result, the members with the most popular catalogs would receive a far smaller percentage of the total votes than the percentage of total ASCAP performance credits attributable to their catalogs.

Other provisions that I have mentioned attempt to give minority groups an opportunity to get together to nominate or elect a director to represent their views on the

Board of Directors.

V. Information and Complaint Procedures.

I now turn to the provisions respecting information and complaint procedures.

A. Access to Society's Records.

Under the proposed Order, ASCAP would be required to make available for inspection by any member a list of

the mailing addresses of all members, except those members who refuse to have their addresses revealed, in which event ASCAP will forward, unopened, any mail addressed to that member in care of ASCAP.

Within nine months after the end of each survey year, ASCAP-would prepare alphabetical lists of all the compositions that received performance credits during that [fol. 237mm] year, indicating thereon the number of credits

received by each.

In addition, the Society would maintain records showing the number of feature performance credits received during the five preceding fiscal survey years by all works that received credit during the preceding year as a theme

or as background, cue or bridge music.

Any member or his authorized agent will be permitted to inspect such lists and such records with respect to his own compositions. Other portions of such lists and records shall be available for inspection by any member or his authorized agent to the extent that inspection is sought in good faith in connection with any financial interest of such member as a member, as opposed to his personal or business interests apart from his membership in ASCAP. In this context "good faith" would embrace any legitimate interest of a member in respect to his relations with ASCAP so long as that interest was not inimical to the welfare of the Society.

All other records of the Society relating to distribution shall be open for inspection by any member or his authorized agent for *good cause*, which really means any sound, legitimate reason, provided that such member shall have been a member of ASCAP for at least one year prior to

his request for inspection.

The object of these provisions is, of course, to safeguard each member's legitimate right to information affecting his participation in the ASCAP royalties, while at the same time preserving the privacy of other members' affairs from unnecessary inquiry. It would be impossible to list the many and varying instances or the facts under which inspection would be either proper or improper.

Hence, the concepts of "good faith" and "good cause" were adopted because they have been found both desirable

and workable in other similar areas. They have frequently been used as general statutory language governing the [fol. 23700] right of inspection and have worked well. They are not just legal gobbledygook words.

B. THE COMPLAINT PROCEDURE.

Under the proposed Consent Order, ASCAP would be required to establish a Special Board, elected in the same manner as the members of the Board of Directors, to entertain complaints by a member relating (1) to the distribution of ASCAP revenue to such member or (2) to any rule or regulation of the Society directly affecting distribution of the Society's revenues to such member. Currently, all such complaints are initially heard by the writers' or publishers' Classification Committees.

Under the proposed Order, a complaint would have to be filed within nine months of the receipt by a member of the annual statement or the rule or regulation on which

his complaint is based.

Each member would have a direct right of appeal from any decision made by the Special Board to an impartial panel of the American Arbitration Association.

VI. Admission to Membership.

The last subject-matter of the proposed Consent Order deals with admission to membership.

Any person whose application for membership has previously been denied between March 14, 1950, the date of the Consent Decree, and the effective date of the proposed Order, and who reapplies for ASCAP membership, will be admitted retroactively to the date of his initial application or 1950, whichever is later, if (1) he was eligible for membership at that date and (2) if he did not subsequently license, through another performing rights organization, the works upon which his qualification for membership is based.

[fol. 237pp] Assuming he qualifies for retroactive admission, this retroactive admission, in many instances, will be only for the purpose of seniority ranking.

Under the existing Consent Decree, ASCAP is not permitted to limit its membership by refusing admission to duly qualified applicants. The proposed Order makes no change in this respect.

I am sure you will be delighted to know that this concludes my detailed discussion of the substantive provisions of the proposed Consent Order.

VII. GENERAL REMARKS.

Having tried your patience thus far, ley me make some general remarks.

If the proposed Order and related documents are approved by Judge Ryan this fall, thereafter certain portions of the Articles of Association relative, for example, to voting and grievance procedures, will have to be submitted to the general membership of ASCAP for approval.

If the required membership approval is given, ASCAP will file with the Court a statement to that effect and the date of filing that statement will be the effective date of the Consent Order.

If the membership does not approve the necessary changes in the articles within the allowed time, which is three months, the Order will be vacated without prejudice to either party. In that event, the issues raised by the Department of Justice would have to be litigated.

This would mean not only great expense but complete uncertainty as to the result and its timing. In any event, in the ensuing period of litigation, ASCAP's position in [fol. 237qq] the industry would be jeopardized and its negotiations with its licensees would be seriously prejudiced.

Some members may feel that the changes which are proposed in the plan before you would adversely affect rights which they now have under the present system where, for example, they may have chosen the ten-year basis in the Sustained Performance Fund whereas it is proposed that everyone not electing the current performance option be put on a five-year basis in the Average Performance and Recognized Works Performance Funds.

Let me remind you that ASCAP and the members are operating under the 1950 decree of the Court. At the start I read you Section XVII of that decree, which permits the Department of Justice to apply for further relief and the Court retains jurisdiction so it can grant further relief.

All rights of members in the distribution of revenue are subject to that basic document and to the Society's Articles of Association. Members' rights thus are not absolute rights.

If the proposed Order is approved by the Court and the necessary changes in the Articles of Association are approved by the membership, then the members will have the assurance of knowing what they will receive, under a plan which I believe is fair.

Unless circumstances change materially, you can rest assured the proposed plan will operate for the reasonably foreseeable future. But if there are completely new and different facts, the Department of Justice or the Court might call for new hearings.

If the proposed Order is not approved, the members will have no assurance of what the future holds in store, and if the matter is litigated, the result may well be far less attractive than what is being proposed today.

[fol. 237rr] In order to keep my remarks within reasonable limits, I have not discussed some provisions in the Consent Order that speak for themselves and need no explanation, such as, for example, the number of performance credits needed for each vote.

I heartily recommend, however, that each member read carefully the proposed Consent Order and the documents filed therewith, as well as my explanatory memorandum, sent to each member on July 21, 1959.

I further urge all members to bring any questions remaining unanswered to the attention of the Society well in advance of the hearing in October. We will do our best to answer you.

As you can see, I sincerely believe that the provisions contained in the proposed Order and related documents, if approved by the Court, will serve the best interests of the entire Society and the membership at large,

In an organization with relationships as complex as those here present, someone will always feel that certain rules or regulations may work to his detriment or that they ought to be changed in some respect which, at first, may seem to be very minor.

However, the proposed Consent Order and the related documents are carefully integrated parts—the warp and

woof-of a single fabric of relationships.

Any one change may thus disturb the balance of these relationships. It may also require several further changes in order to preserve certain equitable principles sought to be served by the ConsentsOrder, to which changes other members may not agree.

Thus, given the difficult problems posed by the Department of Justice, I think that the solutions represented by these provisions are on the whole fair and equitable.

[fol. 23788] I also think the removal of the threat of major and trust litigation will permit the Society to function even more effectively and more harmoniously in the future than it has to date.

By accepting this decree we know that ASCAP will be kept alive as a continuing and united Society work as at the best interests of all of its members.

In a complex situation such as this, compromise to some extent is always necessary. I have advised the Board that in my judgment a more satisfactory solution from the point of view of the Society's best interests probably could not be attained through litigation, although this is always a possibility.

Therefore, the Board of Directors, after extended investigation and the most serious discussion, and with the advice of counsel, has unanimously approved the proposed Order and it unanimously recommends that the necessary amendments to the Articles of Association be approved by the

general membership.

In my negotiations with the Department of Justice and in my advice to the Board of Directors with respect to this proposed Consent Order, I have tried to represent the interests of all of the members of the Society, and to consider and balance their different interests.

I wish to express at this time to President Adams, his predecessor Paul Cunningham, Herman Finkelstein, general attorney of the Society, and to the Board of Directors and to the Society generally, my pleasure in serving the Society in this most interesting and complex matter.

I also wish to thank the staff, the Society's general counsel, Messrs. Schwartz and Froehlich, and the Society's Washington counsel, Messrs. Cox, Langford, Stoddard and

Cutler, for their unfailing co-operation.

Thank you very much.

·[fol. 237tt]

APPENDIX

- Hypothetical Examples Prepared to Guide Members in Calculating Classification Increases and Decreases in the Average Performance and Recognized Works Performance Funds.

The following examples illustrate how the provisions for classification increases and decreases in the Average Performance and Recognized Works Performance Funds would operate in four hypothetical situations.

The column "Actual Performance Credit Average" shows the classification points which the hypothetical member would have, based on his assumed five-year average performance credits, if there were no limitations on classi-

fication increases or decreases.

The column "Classification" shows the point classification assigned to the hypothetical member in the Sustained Performance Fund in 1958, and the point classification that would be assigned to him in the Average Performance Fund in 1959 and thereafter, based upon his assumed latest five-year average of performance credits and taking into account the limitations on classification increases and decreases.

. The column "Computation" shows how the new point classification would be computed each year on the facts

assumed in the examples.

Each member has his own records and knows his own actual facts, which presumably will be different from the facts assumed in the examples. The hypothetical examples may facilitate calculation by an individual member of how

the proposed plan would affect him. They are not actual cases.

[fol. 237uu]

Example A	Actual Performance Credit Average	Classification	Ē.	Computation
1958		450°		
1959	350	425		450 - 25 = 425
1960	350	400		425 - 25 = 400
1961	350	375		400 - 25 = 375
1962	350	350		375 - 25 = 350

EXPLANATION: A point decrease between a 1958 Sustained Performance classification and a 1959 Average Performance classification (or between a 1958 Availability classification and a 1959 Recognized Works Performance classification) would be spread evenly over four years.

Example B.	Artual Performance Credit* Average	Classification	•	Comp	utation -
1958		450°			
1959	450	450	3.	÷ .	
1960	300	400		450 - 50	= 400
1961	350	375		400 - 50	+25 = 375
1962	350	350			+25 = 350

EXPLANATION: Except for decreases between 1958 and 1959 classifications, all point decreases are spread evenly over three years. Except for increases entitling a writer member to a classification of 1,000 or above, all point increases are spread evenly over two years.

 ¹⁹⁵⁸ Sustained Performance (or Availability) classification.

[fol. 237vv]

Example C	Actual Performance Credit Average	Computation		Classification	
1958		450°		*	1
1959	350	425	450	0-25	= 425
1960	400	425	42	5-25+25=	=425
1961	450	450	42	5 - 25 + 25	
				, ,	=450
1962	500	475	450	0-25+25	-
					=475
1963	500	500	. 47	5 + 25	=500

EXPLANATION: Point increase and decrease "carry forwards" are applied cumulatively and concurrently. For example, a portion of a 1959 decrease is applied at the same time as a portion of a 1960 increase.

Example D	Actual Performance Credit Average	Classification	Computation
1958		1,000€	
1959	1,000	1,000	
1960	900	. 950	975 - 25 = 950
1961	900	925	950 - 25 = 925
1962	900	900	925 - 25 = 900
1963	1,000	1,000	(No limitation)

EXPLANATION: There are no limitations on increases to Class 1,000 or above or on decreases from Class 1,000 or above to Class 975.

^{• 1958} Sustained Performance (or Availability) classification.

Note: The above examples apply equally to the Average Performance and Recognized Works Performance Funds. The single difference between the computations for the two funds is that the performance credit average used for classification in the Recognized Works Performance Fund includes only credits attributable to surveyed performances occurring after the expiration of four quarters commencing with the quarter in which a performance of any given work is first recorded in the Society's survey.

EXHIBIT "C" TO AFFIDAVIT

MURRAY HILL 8-8800 GABLE ADDRESS: ASCAP, NEW YORK

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS 575 Madison Avenue New York 22, N. Y.

(Emblem)

To All Members of the Society:

The members have already been advised that a new survey of performances has been designed by Joel Dean Associates, and Mr. Arthur Dean's remarks at the West Coast and New York meetings, which have been printed and sent to all members, generally outline the new survey plan.

Starting October 1, 1959, the Society's survey will be conducted according to the new design of Joel Dean Associates. In about a week's time we plan to send to all members a further memorandum outlining the basic procedures of the survey.

For purposes of distribution to writer members commencing with the October 1959 distribution, the Writers Classification Committee has created three new classes above Class 1000, namely, Classes 1025, 1075 and 1400.

The following table lists the Classes 975 and above, including the three new classes, and gives the number of average performance credits needed for each class.

			7			
Class				Credits		
975			39,000	to	49,999	
1000		* .	50,000	**	62,499	
1025	• * .		62,500	- 44	74,999	
1050			75,000	44	99,999	
1075			100,000	. 66	124,999	
1100	q .		125,000	46	199,999	
1200			200,000	44 1	299,999	
1300			300,000	7	449,999	
-1400		1	450,000	+4	599,999	
1500			over 600,0	000	1.1	

Sincerely yours,

/s/-STANLEY ADAMS Stanley Adams, President.

SA;AW

[fol. 239]

EXHIBIT "D" TO AFFIDAVIT

MUrray Hill 8-8800 Cable Address: ASCAP, New York

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

575 Madison Avenue New York 22, New York

STANLEY ADAMS President

October 5, 1959

To All Members of the Society:

On September 30, 1959, I advised the membership that the Society's survey would be conducted, starting October 1, 1959, according to the new design of Joel Dean Associates.

Joel Dean Associates have prepared a memorandum outlining the basic procedures of the survey, and a copy of that memorandum is enclosed for the information of the members.

Sincerely yours,

STANLEY ADAMS, President

[fol. 239a]

JOEL DEAN ASSOCIATES

Economic and Management Counsel
14 Hopke Avenue
Hastings-on-Hudson, N.Y.

* Hastings-on-Hudson, N.Y. Chicago, Hlinois

> MEMORANDUM FOR THE INFORMATION OF MEMBERS OF ASCAP, WITH RESPECT TO THE NEW SURVEY PUT INTO EFFECT ON OCTOBER 1, 1959

Joel Dean Associates was retained by Mr. Arthur H. Dean, of Sullivan & Cromwell, special counsel for ASCAP, to redesign the ASCAP survey of playings of musical compositions of its members.

Today, ASCAP takes a census of all playings on the ABC, CBS and NBC radio and television networks, as well as all playings by concert and symphony hall licensees. In addition, ASCAP makes a sample survey of local radio and local television playings. No survey is currently made of other licensees, such as hotels, restaurants, nightclubs, and background music services. In the aggregate these other licensees account for approximately 11 percent of the Society's domestic receipts.

It is obvious that it is in the interest of all of the members that the survey be designed to be as accurate as possible. On the other hand, it is equally obvious that survey costs reduce ASCAP revenue available for member distribution, and hence limit the feasible size of the survey.

The Board of Directors of ASCAP authorized us to design a survey which would improve the accuracy of measurement of the playings of the various compositions in the ASCAP catalogue and of their relative values. We recommended, and the Board of Directors approved, a survey which would substantially increase survey costs. The major causes of this cost increase are (1) a substantial increase in the size of the local radio sample and (2) sampling on a scientifically random basis.

[fol. 239b]

Non Radio-Television Licensees

The present census of music played in concert and symphony halls will be continued. Experimental surveys of hotels, restaurants, nightchubs, etc. and background music services will be undertaken in an attempt to determine:

- 1. Whether there is any substantial difference in the identity and in the frequency of playing of compositions between (a) hotels, restaurants, nightclubs, etc., or background music services, on the one hand, and (b) radio and television, on the other hand; and
- 2. Whether it is economically feasible to conduct a survey of hotels, restaurants, nightclubs, etc., or a survey of background music services, i.e., whether the increased accuracy which such surveys would provide would justify the cost of adequate separate surveys of performances by these licensees, as opposed to the present practice of distributing the income from such licensees on the basis of radio and television performances.

An expenditure of \$35,000 has been authorized for these, two experimental surveys.

The remainder of this memorandum will be addressed to the survey of radio and television playings which are the major sources of ASCAP receipts

PERFORMANCE CREDIT ALLOCATION AMONG MEDIA

The provisions of the ASCAP distribution system for average performance credits and for the "qualifying test" for non-feature uses of music make it desirable for the new system to produce an approximately constant total number of credits. The survey is thus planned to produce an aggregate of about 25 million performance credits per year on the writers' side and the same number on the publishers' side.

[fol. 239c] Total credits will be divided among the four media—network radio, local radio, network television—and local television—in proportion to their dollar contribution

to ASCAP receipts. The approximate distribution of performance credits among media will be as follows:

Network Television Local Television	41-44% 16-19%	(10.25-11.0 million credits) (4.00-4.75 million credits)
All Television	60.5%*	(15.12 million credits)
Network Radio	4-6%	(1.00-1.50 million credits)
Local Radio	34-36%	(8.50-9.00 million credits)
All Radio	39.5%*	(9.88 million credits)

Distribution of credits based on 1958 ASCAP receipts.

These percentage figures take into account, as provided in Section II. of the proposed Consent Order, "the revenue. received from affiliated station announcements adjacent to and reasonably attributable to network programs carried by the affiliate." The percentages, and the resultant allocation of credits, will be reviewed and revised periodically to conform with any change in relative contributions of media to ASCAP receipts.

In the event that playings by licensees covered by the experimental surveys are included in the final survey, the above estimates of the distribution of performance credits will be adjusted to take into account the playings covered

by the experimental surveys.

THE NETWORK RADIO AND TELEVISION SURVEY

PERFORMANCE CREDITS WITHIN NETWORK RADIO AND TELEVISION

Within each of the media, the same principle will be applied as was used in assigning total credits to the vari-[fol. 239d] ous media. Thus, the number of performance credits will-vary with the amount of ASCAP receipts attributable to the network hookup on which the playing occurs.

NETWORK TELEVISION

ASCAP will continue to take a census of all playings on the NBC, CBS and ABC networks. This will be done by

Sworn to before me this 16th day of October, 1959.

Mary D. Devlin, Notary Public, State of New York, Residing in New York, New York County Clerk's No. 31-0939800, Certificate filed in New York County Clerk's Office, Commission Expires March 30, 1961.

[fol. 249]

EXHIBIT A TO AFFIDAVIT

MUrray Hill 8-8800 Cable Address: ASCAP, New York

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS 575 Madison Avenue New York 22, New York

STANLEY ADAMS
President

October 9, 1959

.Ta All Members of the Society:

Attached is a memorandum of Mr. Arthur H. Dean with respect to an amendment to the proposed Weighting Formula which was previously sent to the members together with the proposed Consent Order to be presented to Chief Judge Ryan on October 19, 1059. At Mr. Dean's request, a copy of this memorandum is using sent to all members of the Society.

Sincerely yours

STANLEY ADAMS,
President

[fol. 249a]

October 9, 1959

MEMORANDUM WITH RESPECT TO AN ADDITION TO THE PROPOSED WEIGHTING FORMULA

Each of the members has previously received a copy of the proposed Consent Order and Attachments A. B and C thereto, together with a copy of the proposed new Weighting Formula use of logs furnished by the networks, which ASCAP can check by means of the reference tapes it takes of network

programs.

For convenience, groupings were used to determine the relative weight to be given for hookups of varying numbers of stations. Research indicates the following relative values for hookups of various sizes:

Number of Stations		Relative Weight of Playing
1- 30	3	.333
31- 75		.577
76-105		.888
106-139	4	1.000
140-185		1.377
186 and over		1.599
,		

The above groupings were established in order to avoid unnecessary administrative complexity and because it is easier to establish reliable weights for station groups than to attempt finer distinctions in value, for example, the difference in value between a 58-station hookup and a 59-

station hookup.

We examined each of the three major television networks separately (NBC, CBS and ABC), and concluded that the differences among the networks were not so great as to justify a different set of values for each network. However, the network television relationship will be reviewed [fol. 239e] 'periodically so that separate values for the different networks can be established if it becomes desirable to do so.

It is impossible to forecast accurately (i) the total number of playings of musical compositions on network television for the ensuing year, (ii) how many of these playings will be on hookups of 1 to 30 stations, or 31 to 75 stations, etc., and (iii) the number of performance credits which the playings will represent, in view of the fact that certain uses (such as jingles or the use of non-qualifying songs as theme or background music) receive fractional credit. However, for the purposes of this explanation, we have made what seem to be the most reasonable assumptions at the moment.

The members will note that the proposed Weighting Formula provides a credit limit of eight feature performances per quarter hour (see Section (B)(2)). It also contains limitations of credit for multiple themes during any

quarter hour period (see Section (C)(2)M)).

During our discussions with the Department of Justice, we discussed the desirability of a similar limitation on the number of use credits that should be allotted per quarter hour of programming for works performed as background music. In drafting the documents, it was provided in Attachment C to the proposed Consent Order (Weighting Rules) that ASCAP could promulgate rules limiting the credit to be awarded to aggregate performances of all works on a single program or during a period of programming (Section (D)).

The Department of Justice suggested that ASCAP set a limit of four use credits for qualifying works* and works described in the last sentence of Section (C)(3)(b) of the Weighting Formula ** performed as background music per wh quarter hour of programming. As the proposal seemed reasonable to ASCAP, we joined with the Department of Justice in an application to the Court to amend the proposed Weighting Formula in that respect.

Attached heretosis a copy of the order of Chief Judge, Sylvester J. Ryan permitting such amendment.

Arthur H. Dean

See Section (C)(1) of the proposed Weighting Formula.

^{**} Works which have been commercially published for general public distribution and sale, of which a commercial recording has been made as a "single" for general public distribution and sale, and five feature playings of which have been recorded; in the Society's local radio sample survey during the five preceding fiscal survey years.

We have assumed that 44,000 is the number of annual playings on network television of ASCAP works entitled to full credit (converting less than full credit uses by, for example, counting five 20% fractional credit uses as one full credit playing). We have further assumed that the average number of stations hooked into a network program is in the 106-139 station class. On these assumptions, the average multiplier for a television playing would be 242.

10.63 million network television credits*

44,000 full credit playings x 1.00 hookup weight = 242

The multiplier will be lower than this for playings on station hookups in classes below the 106-139 station class and higher than this for playings on station hookups in classes above the 106-139 station class. Thus, a playing on a hookup of between 1 and 30 stations would get 81 credits (242-x .333), a playing on a hookup of 186 or more stations would get 387 credits (242 x 1.599), etc.

These numbers are not final because we are continuing our effort to make the best possible forecast of the total [fol. 239f] number of playings on network television and their distribution by station groupings. The final multipliers will reflect experience gained from the results of the new survey and therefore may vary from the foregoing examples.

NETWORK RADIO

ASCAP will continue to take a census of all playings on commercial programs on the NBC and CBS radio networks. This will be done by the use of logs furnished by the networks, which ASCAP can check by means of reference tapes it takes of network programs.

A census of playings on other networks is not justified because the expense would be out of proportion to the ASCAP receipts from these sources. Playings on these other networks will be covered by the local radio sample.

[•] See table, p. 3.

Radio network sustaining programs will not be covered by the census of radio network playings because accurate information is not available on the number of stations which carry radio network sustaining programs. These programs will be covered by the local survey of the stations carrying the sustaining programs.

As with network television, there will be groupings for different sizes of radio network hookups. Research indicates the following relative values for hookups of various

sizes:

Number of. Stations			:.	Relative Weight of a Playing	
1- 30				.476	
31- 64				.551	
65- 98		4		.700	
99-132		·		.850	
133-166				1.000	
167 and	over		٠.	1.149	

[fol. 239g] We have assumed that 21,000 per year is the number of playings on the NBC and CBS radio networks of ASCAP works entitled to full credit (converting less than full credit uses by, for example, counting five 20° fractional credit uses as one full credit playing). We have further assumed that the average number of stations hooked into a network program is in the 133-166 station class. On these assumptions, the average multiplier for a network radio playing would be 60.

1.25 million network radio credits*
21,000 full credit playings x 1.00 hookup weight = 60

A playing on a hookup of between 31 and 64 stations would receive 33 credits (60 x .551); a playing on a hookup of 167 or more stations would receive 69 credits (60 x 1.149), etc.

Again these numbers are not final because we are continuing our effort to make the best possible forecast of the total number of playings on network radio and their dis-

[•] See table, p. 3.

tribution by station groupings. The final multipliers will reflect experience gained from the results of the new survey and therefore may vary from the foregoing examples.

THE SAMPLE SURVEY OF LOCAL RADIO AND TELEVISION

Substantial changes are being made in the survey of local radio and television playings, in order to permit an income distribution to the Society's members on the basis of a scientific sample of playings and a proper allocation of credits in accord with ASCAP receipts from the station or group of stations from which the playings emanate.

[fol: 239h] Scientific Sampling

A probability sample has been designed which can make efficient use of the principle of scientific random sampling. Its main characteristics are the following:

- 1. The radio sample has been considerably enlarged of in order to increase the accuracy of measurement of playings.
- 2. The coverage of both the radio and television samples has been made more complete and representative.
 - a. More-licensees will be sampled.
 - . b. The different geographic areas in the country will be represented in the sample.
 - c. Within geographic regions, communities with varying economic characteristics will be represented.
 - d. Different times of day, days of the week, and weeks of the year will be represented in the sample.
- 3. The basic method of selection applied to all parts of the sample is scientific random sampling in order to achieve results of known reliability.
- 4. Because sampling is scientifically random, it is possible to stratify or classify licensees into sampling

groups. These groupings can be used to obtain information which will make it possible to vary systematically the proportions sampled in order to get maximum reliability per dollar of expenditure.

SAMPLE SIZE

In a single year there are many million playings on local radio and television of the compositions of ASCAP members. To produce a better measurement of playings, the size of the local radio sample has been enlarged.

[fol. 239i] The local radio sample upon which credit allocation will be based will comprise approximately 52,200 hours of programming (177400 3-hour time units or 8,700 6-hour time units). The local television sample upon-which credit allocation will be based will comprise approximately 30,600 hours of programming (10,200 3-hour time units or 5,100 6-hour time units).

The samples will be obtained from the nine geographic regions defined by the United States Bureau of the Census. Distribution of the sample among these regions, based on the distribution of ASCAP revenue from local radio and television stations, respectively, is as follows:

	Local Radro	6	Legal . Television
New England	6.3%		5.6℃
Middle Atlantic	16.9		19.1
East North Central	20.0		21.4
West North Central	10.3		9.7
South Atlantic	. 14.9		12.9
East South Central	6.5-		4.5
West South Central	9.8		10.3
Mountain	4.9		3.7
· Pacific	10.4		12.6
(Puerto Rico	•		•)
• Less than 1%	Co		

It is planned to review the size of these samples periodically as we gain more knowledge and experience. The operation of the new survey will provide additional knowledge.

edge of processing costs and of variations in the compositions played on network and local radio and television. This knowledge may indicate ways to get greater accuracy for the same expenditure, e.g., by expanding the sample in some sectors and contracting it in others.

[fol. 239] SAMPLE COVERAGE

In both the local radio and local television surveys, more dicensees will be surveyed to insure representativeness.

Performances of compositions in the ASCAP entalogue occur throughout every town and city in the United States and throughout every day in the year. Because there is a chance that musical performances vary among media, for example, local radio vs. local television, separate sample plans have been constructed for local radio and for local television. Similarly, because musical performances may differ by geographic regions, every section of the country is to be represented in order to take account of these possible variations. Within geographic regions there will be scientific random sampling of licensees by size groups (as measured by their ASCAP license fees) to ensure further the representativeness of the sample. Because of possible variations in performances among time periods, different hours of the day, days of the week, and weeks of the year will be represented in the sample.

SCIENTIFIC RANDOM SAMPLING

In all segments of the sample, i.e., by media classes, by geographic area and by time period, the method of selection will be scientific random sampling. Randomness in this centext refers to the process by which a sample is drawn. The ASCAP probability samples, by means of scientifically controlled selection that elaminates discretion in the drawing of the sample, will produce a fair representation of the relative frequency of the playings of compositions of the respective ASCAP members.

SAMPLE RELIABILITY .

Because sampling will be scientifically random, the sample estimates will have a known reliability. With this known

[fol. 252]

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PLEADING IN INTERVENTION &

Applicants Sam Fox Publishing Company, Inc., Movie tone Music Corp., Pleasant Music Publishing Corp., and Jefferson Music Company, Inc., by their attorneys, allege:

- 1. Applicant Sam Fox Publishing Company, Inc. has been a publisher member of the American Society of Composers, Authors and Publishers (hereafter referred to as ASCAP) since 1924, and is a charter standard publisher thereof. Applicant Movietone Music Corporation has been a publisher member of ASCAP since 1932. Applicant Pleasant Music Publishin Corporation has been a publisher member of ASCAP since 1941. Applicant Jefferson Music Company, Inc. has been a publisher member of ASCAP since 1945.
- 2. The instant proceeding in the above-titled action was commenced upon the motion of the plaintiff United States to have the Court review and approve a further amended consent final judgment, that has been agreed to by plaintiff and the Board of Directors of ASCAP, which would modify certain provisions of the existing decree herein entered by the Court on March 14, 1950. Among the provisions of the 1950 decree which would be modified by the further amended consent final judgments there after referred to as the "proposed order") are \$\frac{1}{2}\$ XI and XIII. which provide:

[fol. 253] X

"Defendant ASCAP is hereby ordered and directed to distribute to its members the monies received by licensing rights of public performance on a basis which gives primary consideration to the performance of the compositions of the members as indicated by objective surveys of performances (excluding those licensed by the member directly) periodically made by or for ASCAP."

reliability, frequency of the random sampling in each part [fol. 239k] of the sample can be varied systematically to get the best possible measurements from a given outlay on the survey.

Of course, no one sample is likely to show the exact proportions of the compositions of a particular member. However, over time and with the drawing of successive samples, sampling errors will tend to cancel out because these errors are solely the product of chance.

SAMPLING FREQUENCY

The frequency with which a station or group of stations is sampled is related to the license fees it pays to ASCAP. Among the nine geographic regions of the country, sampling will be most frequent in those regions where stations contribute the largest amounts to ASCAP receipts. For example, twice as many samples will be taken from radio licensees in the West South Central region as from radio licensees in the Mountain region because West South Central radio licensees pay ASCAP twice as much as radio licensees in the Mountain region.

Within geographic regions the same principle is followed. In each of the nine geographic regions listed previously, stations have been classified into groups on the basis of certain economic characteristics of the communities in which the stations are located. Relative frequency of sampling among these communities is again tied to the contribution to ASCAP receipts from the stations in each of these communities. For example, in the West South Central region, radio licensees in metropolitan communities yield about 1.6 times the receipts to ASCAP of radio licensees in non-metropolitan communities and hence about 1.6 times as many samples will be taken in the metropolitan communities.

This sampling procedure is followed within the groups of communities in each geographic region. In each grouping, stations have been classified on the basis of their [fol. 2391] annual ASCAP license fees. In metropolitan communities in the West South Central region, the 459 radio stations which each pay ASCAP an annual license fee

"In order to insure a democratic administration of the affairs of defendant ASCAP, and to assure its numbers an opportunity to protect their rights through fair and impartial hearings based on adequate information, defendant ASCAP is hereby ordered and directed to provide in its Articles of Association:

- shall be elected by a membership vote in which all author, composer and publisher members shall have the right to yote for their respective representatives to serve on the Board of Directors. Due weight may be given to the classification of the member within ASCAP in determining the number of votes each member may east for the election of directors. Elections for the entire membership of the Board of Directors shall take place annually or every two years. The Board of Directors shall, as far as practicable, give representation to writer members and publisher members with different participations in ASCAP's revenue distribution;
- "(B) That the general basis of member classification for voting and revenue distribution purposes shall be set forth in writing and shall be made available to any member upon request;
- "(C) That any member may appeal from the final determination of his classification by any ASCAP committee or board to an impartial arbiter or panel;
- "(D) That records be maintained by the officers, committees, or boards of ASCAP, and the impartial arbiters or panels referred to in Subsection (C) of this Section dealing with the classification of members and distribution of revenues, which will adequately apprise the respective members of the determinations made and actions taken by such officers, committees and boards of ASCAP, and arbiter, or panels as to such members and the basis therefor."
- 3. The proposed order deals with six important phases of ASCAP's internal operations and the relationship of

of \$10,000 or less yield ASCAP, in the aggregate, about three times the aggregate revenue of the 10 stations in these same communities which each pay ASCAP an annual license fee of over \$10,000. Hence, in the aggregate, three times as many samples will be taken of the 400 stations in the \$10,000 and under group as of the 10 stations in the over \$10,000 group.

As provided in Section II of the proposed Consent Order, the Society will endeavor to obtain logs from local station licensees to the extent deemed necessary (1) to reduce non-identification of playings picked up by the sample tapes and to supplement the survey of playings where identification is difficult, e.g., foreign language stations, good music stations and background music stations, and (2) to test and correct the accuracy of the surveys made by means of tape recordings.

PERFORMANCE CREDITS WITHIN LOCAL MEDIA

For purposes of sampling, efficiency, the station groupings within communities have been made relatively broad. However, a finer grouping of stations by revenue classes will be used to compensate for differences in license fees when computing credits to be assigned to a playing on local radio or television. The intent again is to assign credits to playings according to the revenue yields to ASCAP by the licensees from which the playings emanate.

LOCAL RADIO CREDITS

About 8.75 million performance credits will be assigned to local radio.* The local radio sample is designed to include 52,200 hours of programming after discarding, as duplicates, tapes of CBS and NBC network commercial broadcasts.

fol. 239m; For the reasons previously discussed in connection with network radio and television, and because of possible variations in programming amon, geographic regions or among stations of different sizes, it is difficult to make a firm estimate of the number of performance credits

[·] See table, p. 3.

the Society's Board of Directors to the rest of the membership. The provisions of the proposed order dealing with three of these phases are inadequate to achieve the antitrust purposes of this suit. These provisions of the pro-[fol. 254] posed order are those relating to:

- (a) The requirement of the 1950 decree that ASCAP scientifically survey the performances of the compositions of its members as a basis for distributing its revenues to them. (Proposed Order, § II.)
- (b) ASCAP's distribution of such revenues to its members. (Proposed Order, § III (F), Weighting Rules and Weighting Formula.)
- (c) The extent to which ASCAP may weight the votes of its members. (Proposed Order, § IV.)
- 4. Section II of the proposed order is inadequate to accomplish the antitrust purposes of this suit for the following reasons:
 - (a) It fails to require ASCAP to retain an independent agency employing non-ASCAP personnel exclusively, operating outside ASCAP's premises, and completely insulated from any influence by any ASCAP member (directors or otherwise), to conduct an objective survey of performances of works according to scientific sampling principles, to collect the data needed for the proposed Weighting Formula by using appropriate means with respect to all types of performances over the media involved, to make appropriate computations of performance credits attributable to the works performed, and to certify its results to the Society. An objective survey and allocation of performance credits is not possible so long as one group of competitors within the Society, the publishers directly represented on the Board of Directors. retains supervisory control over the collection of information which is the basis for such determinations. as would be permitted under § 11 of the proposed order. The mere employment of an "independent expert" to devise and oversee the application of a scientific sam-[fol. 255] ple, as II proposes, will not remedy this

that will be assigned to each surveyed local radio playing. The best approximation at this time is that a surveyed playing on local radio of an ASCAP work entitled to full credit will be multiplied, on the average, by 16 to obtain the proper number of performance credits to be assigned to such playing. The multipliers will vary to some extent depending on the frequency of sampling the station on which the playing occurs and the ASCAP receipts from that station.

The multipliers which will actually be used in assigning performance credits will reflect experience gained from the results of the new survey.

LOCAL TELEVISION CREDITS

About 4.37 million performance credits will be assigned to local television.* The local television sample is designed to include 30,600 hours of programming after discarding, as duplicates, tapes of CBS, NBC and ABC network broadcasts.

For the reasons stated above in connection with local radio, it is difficult to make a firm estimate of the number of performance credits that will be assigned to each surveyed local television playing. The best approximation at this time is that a surveyed playing on local television of an ASCAP work entitled to full credit will be multiplied, on the average, by 62 to obtain the proper number of performance credits to be assigned to such playing. The multipliers will vary to some extent depending on the frequency of sampling the station on which the playing occurs and the ASCAP receipts from that station.

[fol. 239n] The multipliers which will be actually used in assigning performance credits will reflect experience gained

from the results of the new survey.

A relatively inexpensive and readily available source of information on local television programming is available from the TV Guide publications. By using TV Guide, local broadcasts that are randomly selected in the television sample can be identified and musical performances on these broadcasts identified by reference to cue sheets that

See table, p. 3.

defect, since he can and will judge only the mathematical accuracy of the formula, leaving the accuracy of the information to be sampled, and the allocation of performance credits under the control of persons who are themselves directly interested in the results.

- (b) It fails to require a survey of local radio and television stations using procedures which have been employed by ASCAP since 1936 to survey network stations. (Only this will eliminate the monitoring of local radio and television stations by tape recorders which, even though these stations provide by far the Society's largest source of revenue, is admittedly a "woefully inadequate" and "inaccurate and inefficient" means for obtaining information regarding performances. (See plaintiff's memorandum of September 2, 1959.)) Tabulation of information obtained by these procedures when sampled according to scientific principles would minimize the possibility of error and the effect of deliberately false reporting at the source, while permitting an immense reduction in the number of unidentified local performances. Such a sampling method would also make possible the identification of "non-feature" performances and performances of publie domain arrangements on local radio and television stations which are now, in fact, unsurveyed.
- 5. Section III(F), the Weighting Rules of the proposed order and the appended Weighting Formula are not equitable because they feel to adopt the principle that ASCAP shall be permitted or discriminate in allocating performance credits between different types of performances but not between different works similarly performed. Thus, [foi. 256] ASCAP's Board of Directors has not been deprived of its power to make different distributions of performance credits to members for similar uses of the members' music. Any distinction among compositions other than one relating solely to the amount of copyrighted and noncopyrighted material they contain or relating to type of performance is inequitable. Further, the proposed Weighting Rules do not provide for objective standards for

ASCAP can obtain. Where feasible, tapes of these local television broadcasts will also be obtained to provide a check against this information and to identify further playings where TV Guide information is inadequate or where our sheets are unavailable.

Conclusion

The foregoing represents a general explanation of the new survey put into effect October 1, 1959. It will be subject to review and revision in the light of experience, particularly with respect to the aggregate number of playings on each of the media, the distribution of playings on local radio and television among stations in different size groups, the distribution of playings on network radio and television among hookups of various sizes, the variability of compositions played and disparity in cost among various segments of the survey, and the number of playings for which fractional credit is awarded.

It is a pleasure to acknowledge the cooperation of ASCAP and Sullivan & Cromwell in the development of this survey plan.

October 5, 1959

JOEL DEAN ASSOCIATES

[fol. 240]

[File endorsement omitted]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER AMENDING DOCUMENT ENTITLES "WEIGHTING FOR-MULA" ATTACHED TO THE ORDER TO SHOW CAUSE OF JUNE 29, 1959—Entered October 8, 1959

Upon the annexed consent of the parties hereto, it is hereby

Ordered that the document entitled "Weighting Formula" attached to the order to show cause herein signed by Chief

evaluating the amount of new, as against the amount of public domain, material in any composition.

- 6. Section IV of the proposed order will not achieve the antitrust purposes of the suit to "insure a democratic administration" of the affairs of ASCAP (see § XIII of the 1950 decree), for the following reasons:
 - (a) Under proposed \ IV the publishers directly represented on the ASCAP Board, their affiliates and associates, comprising less than one per cent of the publisher membership of ASCAP, will still retain working control of the Society, holding 4# per cent of the total publisher vote and over 50 per cent of the publisher vote which is, on the average, actually cast and treated as valid in ASCAP elections. The 24 publishers next in size to the publishers directly represented on the Board will have but eleven per cent of the total publisher vote, and the remaining 1,300 or more publisher members of the Society will divide approximately evenly the other 45 per cent of the total publisher vote. For this reason 99 per cent of the publisher membership will still be without power to elect a single director to the ASCAP Board of Directors.
 - (b) Proposed § IV (E), which ostensibly permits minority representation by allowing a group of publishers constituting 1/12 of the total publisher vote to elect a candidate by petition is unworkable. Under the proposed voting system, it will require from 8 to 10 of the 24 publishers next in size to the publishers directly represented on the Board and their associates, to comprise the necessary 1/12 of the total publisher vote. [fol. 257] The ability of such a large group of competitors with conflicting business interests to agree upon one representative is doubtful, if not impossible. But this is the only group that will exist in the Society with a large enough share of the publisher vote to make a successful petition even theoretically possible.

"A democratic administration" of the Society can be secured only by instituting the following measures:

Judge Sylvester J. Ryan and dated June 29th, 1959, is hereby amended by inserting in Section (C)(3) of said "Weighting Formula" a new paragraph (c) as follows:

r(c) If the aggregate use credit allotted to qualifying works and works described in the last sentence of subparagraph (3)(b) above performed as background music per each quarter hour of programming would exceed four use credits, the use credit allotted to each such work shall be reduced pro rata so that all such works performed as background music on the entire program shall receive an aggregate of four use credits per each quarter hour of programming."

[fol. 241] and changing the lettering of subparagraphs (3)(c), (d), (e) and (f) to (d), (e), (f) and (g), respectively.

Dated: October 8th, 1959

Sylvester J. Ryan, Chief Judge.

We hereby consent to the making and entry of the above order.

Dated: October 8, 1959:

Richard B. O'Donnell, Attorney for Plaintiff. Arthur H. Dean, Attorney for Defendants.

[fol. 242] It is proposed that the attached memorandum of Arthur H. Dean and the letter of Stanley Adams be sent with the annexed order to the membership of ASCAP.

Richard B. O'Donnell, Attorney, Department of Justice.

Howard T. Milman, Attorney for Defendant.

[fol. 243] [ASCAP Letterhead]

October 9, 1959

To All Members of the Society:

Attached is a memorandum of Mr. Arthur H. Dean with respect to an amendment to the proposed Weighting Formula which was previously sent to the members together

- (a) A class voting system should be created that would enable the smaller and smallest publisher members to elect representatives to the Board of Directors independently without the support of the largest publisher members.
- (b) Standard (serious) music publishers must be provided with their own class of directors to whom sole control of the licensing of ASCAP's serious music should be granted in order to deprive the largest popular publishers of power to waive royalties on performances of serious music as a means of gaining good will in the music industry for their administration of ASCAP.
- (c) Stringent restrictions must be placed on the election to the Board of Directors of officers of publishers owned by, or owning, licensees of the Society.
- (d) Election to the Society's initial board of appeal (the "special board" of proposed \(V \) (D)) must be on the same class-representation basis as that of the Board of Directors.
- (e) Added insurance of a "democratic administration" of ASCAP would be provided through the appointment by this Court of public members to the Society's Board of Directors and board of appeals.
- 7. Apart from the inadequacies of the foregoing provisions of the proposed order, a decree, to be fair and [fol. 258], equitable and to fulfill the antitrust purposes of this suit, must also provide that each member, of ASCAP shall be granted access to all records relating to the allocation of performance credits in the custody of the Society. The Board of Directors should be permitted to deny such access only for good cause shown (contrary to proposed order § V (C)). All decisions made by the ASCAP board of appeals must automatically be circulated to every member of the Society (contrary to proposed order § V (D)). Remittance statements to writer and publisher members must cover the same-calendar period. All foreign revenues regardless of amount must be distributed to the respective

with the proposed Consent Order to be presented to Chief Judge Ryan on October 19, 1959. At Mr. Dean's request, a copy of this memorandum is being sent to all members of the Society:

.. Sincerely yours,

Stanley Adams, President. October 9, 1959.

[fol.,244]

MEMORANDEM WITH RESPECT TO AN ADDITION TO THE PROPOSED WEIGHTING FORMULA

Each of the members has previously received a copy of the proposed Consent Order and Attachments A, B and C thereto; together with a copy of the proposed new Weighting Formula.

The members will note that the proposed Weighting Formula provides a credit limit of eight feature performances per quarter hour (see Section (B)(2)). It also contains limitations of credit for multiple themes during any quarter hour period (see Section (C)(2)(d)).

During our discussions with the Department of Justice, we discussed the desirability of a similar limitation on the number of use credits that should be allotted per quarter hour of programming for works performed as background music. In drafting the documents, it was provided in Attachment C to the proposed Consent Order (Weighting Rules) that ASCAP could promulgate rules limiting the credit to be awarded to aggregate performances of all works on a single program or during a period of programming (Section (D)).

The Department of Justice suggested that ASCAP set a limit of four use credits for qualifying works* and [fol. 245] works described in the last sentence of Section (C)(3)(b) of the Weighting Formula** performed as back.

[•] See Section (C)(1) of the proposed Weighting Formula.

Works which have been commercially published, for general public distribution and sale, of which a commercial recording has been made as a "single" for general public distribution and sale, and five feature playings of which have been recorded in the Society's local radio sample survey during the five preceding fiscal survey years.

ground music per each quarter hour of programming. As the proposal seemed reasonable to ASCAP, we joined with the Department of Justice in an application to the Court to amend the proposed Weighting Formula in that respect.

Attached hereto is a copy of the order of Chief Judge Sylvester J. Ryan permitting such amendment.

Arthur H. Dean

[fol. 246] [File endorsement omitted]

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Affidavit of Arnold Saemann Re Mailings— Filed October 16, 1959

State of New York) ss.:

Arnold Saemann, being duly sworn, deposes and says:

I am over twenty-one years of age and am employed by the American Society of Composers, Authors and Publishers (hereinafter "ASCAP"). My duties include the supervision of mailing documents to the members of ASCAP.

On October 9, 1959, envelopes were addressed to all members of ASCAP by running them through the ASCAP addressograph. Thereafter all such envelopes were delivered to Mr. William Straus of Neville Press, Inc.

Arnold'Saemann

Sworn to before me this 15th day of October, 1959.

Henry Hofschuster, Notary Public, State of New York, No. 03-6934200, Qualified in Bronx County, Cartificate filed in New York County, Commission Expires March 30, 1960. [fol. 247.]

United States District Court Southern District of New York

[Title omitted]

Affidavit of William Strauss as to Mailing Documents
—Filed October 16, 1959

State of New York) ss.
County of New York)

William Strauss, being duly sworn, deposes and says:

I am over twenty-one years of age and am employed by Neville Press, Inc.

Exhibit A hereto attached is a copy of a booklet containing copies of (1) a letter dated October 9, 1959, addressed to all members of the American Society of Composers, Authors and Publishers (hereinafter "ASCAP") and signed by Mr. Stanley Adams, President of ASCAP, (2) a "Memorandum With Respect To An Addition To The Proposed Weighting Formula", signed by Arthur H. Dean, Esq., and (3) an Order, dated October 8, 1959 and signed by Honorable Sylvester J. Ryan, Chief Judge, United States District Court for the Southern District of New York.

on October 9, 1959, I received from the offices of ASCAP at 555 Madison Avenue, New York 22, N. Y., packages stated to contain empty envelopes addressed to all members of ASCAP. Thereupon I delivered all such envelopes [fol. 248] and a quantity of copies of Exhibit A in excess of the number of such envelopes to The Garber-Pollack Company, where one copy of Exhibit A, and no other documents of aderial, was inserted in each of such envelopes.

On October 9, 1959, all the aforesaid envelopes, securely sealed and postpaid, first-class, were mailed at the Church Street Station Branch of the New York Post Office.

William Strauss

[fol. 249b]

United States District Court
- Southern District of New York

UNITED STATES OF AMERICA,

Plaintiff.

American Society of Composers, Authors and Publishers, et al.,

Defendants.

Upon the annexed consent of the parties hereto, it is hereby

ORDERED that the document entitled "Weighting Formula" attached to the order to show cause herein signed by Chief Judge Sylvester J. Ryan and dated June 29th, 1959, is hereby amended by inserting in Section (C)(3) of said "Weighting Formula" a new paragraph (c) as follows:

"(c) If the aggregate use credit allotted to qualifying works and works described in the last sentence of subparagraph (3)(b) above performed as background music per each quarter hour of programming would exceed four use credits, the use credit allotted to each such work shall be reduced pro rate so that all such works performed as background music on the entire program shall receive an aggregate of four use credits per each quarter hour of programming."

and changing the lettering of subparagraphs (3)(c), (d).
(e) and (f) to (d), (a), (f) and (g), respectively.

Dated: October 8, 1959

(Sgd) Sylvester J. Ryan Chief Judge

We hereby consent to the making and entry of the above order.

Dated: October 8, 1959

RICHARD B. O'DONNELL Attorney for Plaintiff ARTHUR H. DEAN Attorney for Defendants [fol. 250]

[File endorsement omitted]

United States District Court Southern District of New York

[Title omitted]

Notice of Motion and Motion of Sam Fox Publishing, Company, Inc., et al., for Permission to Intervene— Filed October 13, 1959

Please Take Notice that upon the proposed further amended final judgment filed by the plaintiff herein, the annexed pleading in intervention, upon the accompanying memorandum of points and authorities, and a further memorandum to be filed on October 19, 1959, a motion will be made herein before Judge Ryan in his courtroom, United States Courthouse, Foley Square, New York City, on the 19th day of October, 1959, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order permitting applicants to intervene as of right herein pursuant to Federal Rule of Civil Procedure 24(a), subparagraph (2), upon the ground that the representation of applicants' interest by existing parties is inadequate and applicants will be bound by a judgment herein, or in the alternative, pursuant to Rule 24(b), subparagraph (2). upon the ground that applicants' claims and the main action have a question of law or fact in common.

[fol: 251] Dated: October 13, 1959, New York, New York.

Herbert Cheyette, Attorney for Applicants, Sam Fox Publishing Company, Inc., Mevictone Music Corporation, Pleasant Music Publishing Corporation, Jefferson Music Company, Inc., 11 West 66th Street, New York 23, New York.

To:

William D. Kilgore, Jr., Esq., Department' of Justice; Washington 25, D. C., Attorney for Plaintiff.

Arthur H. Dean, Esq., 48 Wall Street, New York, New York, Attorney for Defendant.

writers and publishers having an interest therein (contrary to proposed order § III (E)).

Wherefore, applicants respectfully pray that the proposed order be rejected by the Court, and that any modified decree which is approved by the Court include provisions necessary to accomplish the antitrust purposes of this suit as stated in Paragraphs 4 through 7 above.

Herbert Cheyette, 11 West 60th Street, New York, New York.

Charles A. Horsky, Alvin Friedman, 701 Union Trust Building, Washington 5, D. C., Attorneys for Applicants, Sam Fex Publishing Company, Inc., Pleasant Music Publishing Corporation, Jefferson Music Company, Inc., Movietone Music Corporation.

Dated: Washington, D. C., October 13, 1959.

[fol. 315]

Ехнівит 3

UNITED STATES DEPARTMENT OF JUSTICE WASHINGTON, D. C.

(Emblem)

Address Reply to the Division Indicated and Refer to Initials and Number

RAB:WDK 60-22-5

August 5, 1959

Herman Finkelstein, Esquire 575 Madison Avenue New York 22, New York

Re: United States v. American Society of Composers, Authors and Publishers

Dear Mr. Finkelstein:

Pursuant to a suggestion made by Mr. Lloyd Cutler I am referring to you a series of questions submitted to this Department by a member of ASCAP. Will you prepare

answers to these questions and send them to me for forwarding to the member.

I anticipate that you will not have any information from which you can prepare an answer to question 7. A statement to that effect will suffice.

Your cooperation in this matter is appreciated.

Sincerely yours,

/s/ ROBERT A. BICKS
ROBERT A. BICKS
Acting Assistant Attorney General
Antitrust Division

cc: Lloyd N. Cutler, Esquire 1625 I Street, N. W. Washington, D. C.

[fol. 315a] 1. With respect to provision III-E of the proposed order:

- A. How many foreign societies furnish remittances of more than \$200,000.00 per year to ASCAP?
 - a. Pany, name them.
 - b. If any, state the number of years the remittances have been more than \$200,000.00.
- B. How many foreign societies make remittances to ASCAP?
- 2. With respect to provision IV-B of the proposed order:
 Using the last annual ASCAP remittances to publishers as a basis with respect to the proposed new publishers voting formula, state the following:
 - a. The number of votes that will be cast by each of the publisher members and affiliated publishers now represented on the Society's Board of Directors? What percentage of the total possible vote will said Board of Directors and affiliated publishers control?
 - b. State the number of votes capable of being cast by the 50 publishers receiving the great-

est distribution from the Society. Indicate which, if any, of these 50 publishers are affiliated with each other.

- c. State the total number of publishers who will have one vote.
- d. State the total number of votes capable of being cast.
- e. Excluding the publishers represented on the Board of Directors and their affiliated companies what is the minimum number of publishers that will be capable of combining so as to constitute one-twelfth of the total possible vote.
- 3. With respect to provision IV-B of the proposed order:
 - a. State the number of years each of the publishers currently represented on the Board of Directors, has had a representative on the Board of Directors.

[fol. 315b] 4. With respect to the proposed "Weighting Rules", Section 5-B:

Of the 377 works owned by publishers represented on the Society's Board of Directors being used as themes and having accumulated 20,000 credits as of April 2, 1958, according to the ASCAP affidavit "A-14" in the appendix to the record of the Hearings before Sub-Committee No. 5 of the Select Committee on Small Business, House of Representatives, page 538, question 9, how many of these works accumulated their 20,000 credits in the two years first succeeding the first performance recorded in the ASCAP survey?

5. With respect to the proposed "Weighting Rules", Section 5-B:

For each year beginning January 1, 1943 state-

a. The type of survey employed by ASCAP, if any.

- b. The media surveyed, if any.
- c. The type of sample, if any.
- d. The data taken, if any.
- e. Type of records kept and presently extant in the files of the Society.

State generally the information and data shown in the above records with respect to each of the years in question.

6. With respect to the proposed "Weighting Rules", Section 5-B:

What is the first date on which ASCAP surveyed the following:

- a. Local radio stations.
- b. Network radio stations.
- c. Local TV stations.
- d. Network TV stations.
- e. What is the date on which a procedure was first instituted whereby reference tapes were taken on a continuing basis of performances in each of the above?
- [fol. 315c] f. What is the date on which an objective sample was first instituted by the Society?
- g. With respect to the media mentioned above, what is the date on which types of uses were first indicated in the ASCAP survey?
- h. With respect to the media mentioned above, what is the date on which duration of performance was first indicated?
- i. What is the significance of the dates January 1, 1943? October 1, 1955?

7. With respect to the proposed "Weighting Formula" provision 8-F:

What percent of the uses in the following media are "live" and what percent "recorded", according to the current ASCAP survey?

- a. Radio network.
- b. Local radio.
- c. TV network.
- d. TV local.

With respect to the above interrogatories, it is not necessary to mention any publisher by name.

[fol. 316]

Ехнівіт 4

SULLIVAN & CROMWELL

48 WALL STREET

NEW YORK 5...

CABLE ADDRESS "LADYCOURT"

September 4, 1959

OP

Herbert Cheyette, Esq., 11 West 60th Street, New York, New York.

Dear Mr. Cheyette:

After receiving your letter of July 14, 1959 to Mr. Robert Bicks, the Department of Justice advised us that these questions had been asked by a member of ASCAP but without giving the identity of the member making the request.

It seemed appropriate that the answer to these questions be given to all the members of ASCAP together with the answers to questions asked by other members, and it was decided that the answers would be included in Mr. Dean's remarks at the membership meetings on the West Coast and in New York. This was done and a printed copy of Mr. Dean's West Coast remarks has been mailed to each member of the Society. A printed copy of Mr. Dean's remarks in New York is being mailed today to each member, and I enclose an extra copy for your convenience.

Since that time, we have been advised of further questions which you have asked on behalf of Sam Fox Publish-

ing Company, a member of the Society.

As we understand that you are now asking these questions of ASCAP on behalf of a member, and completely apart from any pending motion with regard thereto, we are happy to furnish the information which you have requested.

[fol. 316a] So that you may have all the answers in a single document, we restate the answers already furnished

to you and all the other members by Mr. Dean.

A. Remittances of more than \$200,000 per year have been received by ASCAP from England since 1943, from France since 1952, from Canada since 1953, and from West Germany since 1955.

B. ASCAP receives remittances from approximately twenty-two foreign Societies.

. 2. (a) The number of votes of the publisher members now represented on the Board of Directors, including affiliated publishers, would initially aggregate about 1,505 votes out of a total of 4,908 votes. Of the twelve publisher members of the Board of Directors, including affiliated members, one would have 424 votes, one would have 393 votes, one would have 254 votes, three would have between 98 and 111 votes, three would have between 21 and 43 votes and three would have between 3 and 6 votes.

- (b) According to the latest available figures, the fifty publishers with the highest number of current performance credits (the proposed basis for allocating votes), would have 2,479 out of a total of 4,908 publisher votes. Fourteen of these publishers are affiliated with others among the top fifty.
- (c) 409 publisher members would have one vote each.
 - (d) The total number of publisher votes capable of being cast, based upon the latest available figures, would be 4,908.
 - [316b] (e) The breakdown of the total possible vote, and the votes actually cast, in each election of the Board of Directors for the past nine years, by the writers and publishers respectively is as follows:

Board of Directors Elections		Potential Vote	Number of Votes Cast	% of Votes Cast to . Potential
March 26, 1959	Writers	503,510	397,347	78.9
	Publishers	22,363	19,554	87.4
March 25, 1957	Writers	· 432,955	337,057	77.8
	Publishers	19,184	16,885	88.0
March 28, 1955	Writers	408,659	306,982	75.1
	Publishers	17,782	16,529	93.0
March 30, 1953	Writers	223,142	168,240	79.5
	Publishers	12,517	10,165	81.2
March 22, 1951	Writers	156,462	124,408	79.5
	Publishers	8,687	8,218	94.6

Note: Number of Votes Cast—Includes Ballots which were Improperly Voted and Ballots which were Unsigned.

(f) The following gives the percentage of the publishers' total distribution of revenue which was received by Board publisher members and their affiliates during the last five years:

[fol. 316c]

1954 \$ 8,715,755 \$5,506,547 63.21% 1955 8,892,154 5,436,155 61.13% 1956 9,349,302 5,599,246 59.88% 1957 10,343,563 6,216,557 60.09% 1958 10,884,149 6,249,166 57.40%	Year		Total Publishers'	Board, Publisher Members and Affiliated Companies	« Percentages
1956 9,349,302 5,599,246 59.88% 1957 10,343,563 6,216,557 60.09%	1954		\$ 8,715,755	\$5,506,547	63.21%
1957 10,343,563 6,216,557 60.09%	1955		8,892,154	5,436,155	61.13%
	1956		9,349,302	5,599,246	59.88%
1958 10,884,149 6,249,166 57.40%	1957	***************************************	10,343,563	6,216,557	60.09%
	1958	***************************************	10,884,149	6,249,166	57.40%

- 3. (a) Excluding the publishers represented on the Board of Directors and their affiliated companies, the minimum number of publishers that would be capable of combining to constitute 1/12 of the possible vote, according to the latest available figures, is four.
- (b) Under the voting procedure provided in Section IV (E), the number of votes is based upon the number of current performance credits received in the latest available fiscal survey year preceding each election. It is expected that in July of each year each member will be advised of his number of current performance credits received in the preceding fiscal survey year, from which he can determine the number of his votes by referring to Article IV of the proposed Order. Elections for Directors are generally held in March and votes would be based upon the current performance credits of which the member would have been notified during the preceding July. The Society, in July of each year or shortly thereafter, will have available the number of total possible votes for elections to be held during the succeeding year.
- [fol. 316d] 4. Of the twelve publishers currently represented on the Board of Directors, two of them have been so represented since 1914, two since 1924, one since 1938, two since 1939, one since 1947, three since 1957, and one since 1959.
- 5. Of the 377 works referred to, 31 works published between 1936 and January 1, 1943 received over 20,000 credits in the first two years and 31 works published

subsequent to January 1, 1943 received over 20,000 credits in the first two years. For further information, see pages 28-29 of Mr. Dean's printed remarks at the New York meeting.

6. The Society has been surveying all radio network performances since 1936 by use of logs furnished by the networks. A similar survey of television network performances was started in 1949. A sample survey has been conducted of local radio programs since 1950 and of local television programs since 1951; the local surveys have been conducted by taking tape recordings of sample programs, supplemented in the case of local television by the use of "TV Guide" and film cue sheets. In addition the Society has surveyed performances by symphonic and concert licensees.

The Society samples each day by use of tape recorders located in 22 major metropolitan cities, a threehour period of radio broadcasting by a station, selected randomly and in non-biased fashion, located in each of these areas and samples a similar period of television presentation by randomly selecting stations located in

these areas.

The Society also receives three-hour tapes of local radio broadcasts from approximately 14 roving finan-[fol. 316e] cial auditors, who take daily tapes of radio stations located throughout the country in areas other than those represented by the 22 fixed locations. The tapes of local television programs are supplemented by local film programs selected randomly by the "TV Guide" presentations. The music content of these programs are obtained from film "cue sheets".

Starting January 1, 1943, dates of all performances were recorded and, when the local surveys started, performances on local radio and television were so noted. Starting October 1, 1955, the records of the Society indicate the various uses of a given performance, such as feature use, theme, background, jingle, etc. These records are extant in the files of the Society.

7. See answer to question 6 with respect to items (a), (b), (c), (d), (f), (g) and (i).

All local radio and television tapes are "reference tapes" and such tapes have been taken since 1950 on local radio and since 1951 on local television. "Reference tapes" for network radio and television have been taken since January 1957.

A durational credit system was inaugurated in 1945 and assumed its present form in 1955 for local performances and in 1957 for network performances.

8. We are advised that ASCAP does not compile statistics as to the percentages of its income distributed by reason of feature performances, themes, jingles,

background music and cue or bridge music.

We are further advised that ASCAP does not compile statistics as to the percentages of the logged performances in the ASCAP survey attributable to uses as feature performances, jingles, themes, background music or cue and bridge music, except that for the [fol. 316f] period January 1, 1957 through September 30, 1957 (and that period only), there was prepared a summary of performs 3 (playings) logged in the ASCAP survey, which indicates the breakdown among (i) feature performances, (ii) jingles, (iii) themes and (iv) background and cue and bridge music; the figures for that period are:

Feature	perform	ances		62.73%
Jingles.				7,55%
Themes				10.13%
Backgro	und, cue	and bridge	music	19.59%

Note: No separate figures are available for background music alone or for cue and bridge music alone.

9. The Society's survey does not distinguish between "live" and "recorded" performances, and the Society has no record as to the percentages of use of . "live" or "recorded" performances.

Very truly yours,

Howard T. Milman

CC: William D. Kilgore, Jr., Esq.
Antitrust Division
United States Department of Justice
Washington, D. C.

[fol. 319]

Ехнівіт 7

CABLE ADDRESS - SAMFOX NEWYORK

SAM FOX PUBLISHING COMPANY INCORPORATED

Music [Emblem] Publishers

RCA BUILDING · RADIO CITY · NEW YORK, N. Y. CHICAGO · HOLLYWOOD

New Address

This Letter From New York Office 11 West 60th Street New York 23, N. Y.

PHONE: CIRCLE 7-3890

HERBERT CHEYETTE RESIDENT COUNSEL

September 16, 1959

Mr. Herman Finkelstein ASCAP 575 Madison Avenue New York 22, N. Y.

Dear Mr. Finkelstein:

Pursuant to our telephone conversation, I am hereby requesting ASCAP to supply me with the following information:

- 1. The exact dates during which the following members have served on the ASCAP Board of Directors:
 - (a) Jack Bregman
 - (b) Richard Murray
 - (c) Bernard Goodwin
 - (d) Saul Bourne

2. The exact dates during which the Music Publishers Holding Company has had a representative on the Board of Directors.

Thank you for your prompt reply.

Sincerely yours,

SAM FOX PUBLISHING COMPANY, INC.

/s/ Frederick Fox Frederick Fox

HC:am

[fol. 320]

Ехнівіт 8

September 17, 1959

Mr. Frederick Fox Sam Fox Publishing Company, Inc. 11 West 60th Street New York 23, N. Y.

Dear Mr. Fox:

The following information is furnished in answer to your letter of September 16:

1. The following members of the Board of Directors served for the periods indicated:

Jack Bregman	9/19/35- 3/25/47 8/27/57 to date	
Richard Murray	8/27/41-12/31/45	
Bernard Goodwin	2/13/51- 6/27/57 4/28/59 to date	
Saul Bourne	1/ 1/21-10/13/57	

2. Music Publishers Holding Company does not have a representative on the Board of Directors. I understand, however, that it was organized in 1929 and that Harms, Inc. and M. Witmark and Sons are and have been subsidiaries of that corporation since that time. On of these companies

or the other has been represented on the Board of Direco tors during the following periods:

> 1929 to July 17, 1935 October 19, 1935 to December 5, 1935 October 28, 1936 to date

I trust this is the information you desire.

Sincerely yours, Herman Finkelstein

HF:H

[fol. 323]

Exhiber 11. CABLE ADDRESS - SAMFOX NEWYORK

SAM FOX PUBLISHING COMPANY INCORPORATED

[Emblem] PUBLISHERS

RCA BUILDING · RADIO CITY · NEW YORK, N. Y. CHICAGO · HOLLYWOOD

New Address.

THIS LETTER FROM NEW YORK OFFICE 11 WEST 60TH STREET NEW YORK 23, N. Y.

PHONE: CIRCLE 7-3890

HERBERT CHEYETTE RESIDENT COUNSEL

September 28, 1959

Mr. Herman Finkelstein ASCAP 575 Madison Avenue New York 22, N. Y.

Dear Mr. Finkelstein:

As a member, would you kindly supply to us the following information:

The amount of publisher current performance credits and publisher revenue received by the following publishers and other "groups of affiliated publisher members" (as that term is used in ASGAP's Articles of Association) during the year 1958.

The publishers are as follows:

M.P.H.C.
THE BIO THREE
CHAPPELL
MILLS
SHAPIRO-BERNSTEIN
SCHIRMER
FISCHER
PARAMOUNT
BOURNE

It will not be necessary to identify these publishers by name.

Sincerely yours.

SAM FOX PUBLISHING COMPANY, INC.

/s/ Frederick Fox Frederick Fox

HC:am

[fol. 324]

Ехнівіт 12

October 7, 1959

Mr. Frederick Fox
Sam Fox Publishing Company
RCA Building—Radio City
New York, New York

Dear Mr. Fox:

Your letter to me of September 28 arrived while I was out of town. I have just returned and have had the information you requested compiled.

The following are lists of the performance credits earned and the amounts distributed, during the periods indicated,

for the publishers referred to in your letter, as well as their affiliated companies.

Current Performance Credits Survey Year 19/1/57-9/30/58	Amount Distributed Year 1958
5,273,563.56	\$1,903,951.18
3,652,743.46	1,290,013.41
3,219,757,01	1,342,367.24
1,135,049.40'	490,727.69
972,117.21	345,004.64
911,561.73	396,143.78.
891,423.29	346,557.30
225,061.22	124,926.50
^b 218,245.05	107,781.04

Sincerely yours,

Herman Finkelstein

HF:Pm

[fol. 325]

Ехнівіт 13

New Address: 443 West 49th St. New York 19, N. Y. Tel. CIrcle 7-3632

PLEASANT MUSIC PUBLISHING CORP.

117 West 48th Street New York 19, N. Y. CIRCLE 7-3632

September 30, 1959

Mr. Herman Finkelstein A. S. C. A. P. 575 Madison Avenue New York 22, New York

Dear Herman:

I am trying to form my own opinion about the changes that have been proposed for the voting and distribution in ASCAP.

In order to analyze all the facts properly, I would appreciate the following information:

- (1) What was the net amount of distribution for publishers for the years 1952, and 1953, respectively?
- (2) What are the names of the ten largest publishers and their affiliates, referred to in Section IV C of the proposed Consent Decree, on the basis of the most recent ASCAP distribution?
- (3) What is the minimum number of publishers, excluding the top ten and Carl Fischer and G. Schirmer, that would comprise one-twelfth of the Society's vote under the proposed new voting system?

Thanking you, and with kindest regards,

Sincerely yours,

PLEASANT MUSIC PUBLISHING CORP.

/s/ HANS H. J. Lengsfelder

HJL:jga

[fol. 326]

Ехнівіт 14

October 7, 1959

Mr. H. J. Lengsfelder Pleasant Music Publishing Corporation 443 West 49th Street New York 19, N. Y.

Dear Hans:

I have your letter of September 30. It arrived while I was out of town.

I shall treat the questions you put to me in the order set out in your letter:

1. The net distribution to publisher members in 1952 and 1953 was as follows:

1952—\$6,145,188.41 1953 — \$6,516,11.15

- 2. You will find enclosed a list of the ten publisher groups with the largest publisher votes according to the distribution for the survey year 1958 (10/1/57 9/30/58).
- 3. Based on the publisher performance credits for the 1958 survey year, it would require 8 publishers and their affiliates (excluding the top 10 and Carl Fischer and G. Schirmer) to comprise 1/12 of the publisher vote under the proposed new voting system. As you know, four publishers who are not on the board of directors would in the aggregate have more than one-twelfth of the votes.

Sincerely yours,

Herman Finkels tein

HF:H enc. cc PM cc Mr. Milman

[fol. 326a]

LIST OF TEN PUBLISHER GROUPS WITH LARGEST PUBLISHER VOTES

BOURNE, INC., GROUP

A. B. C. Music Corporation Bogat Music Corporation Bourne, Inc. Lady Mac Music Co.

BREGMAN GROUP

Bregman, Vocco & Conn, Inc.
Chatham Music
Lombardo Music Inc.
Rosemeadow Publishing Corp.
Supreme Music Corp.
Triangle Music Corp.
Vernon Music Corp.

CHAPPELL GROUP

A. M. Music Corp. Buxton Hill Music Corp. CHAPPELL & Co., INC. DE SYLVA, BROWN & HENDERSON ELAR MUSIC CORP. G & C MUSIC CORP. GEASHWIN PUB. CORP. SAMUEL GOLDWYN MUSIC PUB. CORP. T. B. HARMS Co. IVY MUSIC CORP. JUBILEE MUSIC LOWAL MUSIC CORP. McHoon & Adamson Music Inc. MUTUAL MUSIC SOCIETY, INC. THE PLAYERS MUSIC CORP. PUTNAM MUSIC, INC. STRATFORD MUSIC CORP. WILLIAMSON MUSIC, INC. VICTOR YOUNG PUBLICATIONS, INC.

FAMOUS GROUP

BIRDEES MUSIC CORP.
BURVAN MUSIC CORP.
FAMOUS MUSIC CORP.
PARAMOUNT MUSIC CORP.
PARAMOUNT-ROY ROGERS MUS.

[fol. 326b] Lou Levy Group

BLOSSOM MUSIC CORP.
DELKAS MUSIC PUB. CO.
HUBERT MUSIC CORP.
LEEDS MUSIC CORP.
PICKWICK MUSIC CORP.

MILLS GROUP

AMERICAN ACADEMY OF MUSIC MILLS MUSIC INC. B. F. WOOD MUSIC Co.

MORRIS GROUP

CHARLING MUSIC CORP. CRESTVIEW MUSIC CORP. HARWIN MUSIC CORP.

JAYVEE MUSIC PUBLISHING CO.
MAYFAIR MUSIC CORP.
MELROSE MUSIC CORP.
MORLEY MUSIC CO., INC.
EDWIN H. MORRIS & Co., INC.

ROBBINS GROUP

LEO FEIST, INC.
WALTER JACOBS, INC.
LION MUSIC CORP.
MILLER MUSIC CORP.
PINE RIDGE MUSIC, INC.
ROBBINS MUSIC CORP.
VARIETY MUSIC
P.D.S. MUSIC PUBLISHERS INC.
VILLA MORET, INC.

SHAPIRO BERNSTEIN GROUP

COLUMBIA PICTURES MUSIC CORP. Mood Music Co., Inc. Shapiro, Bernstein & Co., Inc. Skidmore Music Co., Inc

WARNER GROUP

Advanced Music Corp.
Atlast Music Corp.
Fullarton Music, Inc.
Harms, Inc.
New World Music Corp.
Remick Music Corp.
Shubert Music Pub. Corp.
Victoria Publishing Co.
M. Witmark & Sons

[fol. 327]

Ехнівіт 15

: (Stamp)

New Address:

443 West 49th St. New York 19, N. Y. Tel. Circle 7-3632

PLEASANT MUSIC PUBLISHING CORP.

117 WEST 48TH STREET NEW YORK 19, N. Y. CIRCLE 7-3632

October 13, 1959

Mr. Hesman Finkelstein A. S. C.-A, P. 575 Madison Avenue New York 22: New York

Dear Herman:

Thank you for your prompt answer to my questions regarding the new Order.

I am sorry if I have to bother you once more and ask for the names of the eight publishers and their affiliates that would make up one-twelfth of the publisher votes (excluding the top ten, Carl Fischer, and G. Schirmer.)

However, you will understand that with changes that eventually will take place, it will be important to know which publishers can petition for one Board member.

Thanking you, I remain

Sincerely,

/s/ H. J. LENGSFELDER H. J. Lengsfelder

HJL:jga

[fol. 328]

Ехнівіт 16

October 16, 1959

Mr. Hans J. Lengsfelder Pleasant Music Publishing Corp. 443 West 49th Street New York 19, N. Y.

Dear Hans:

In your letter of October 13, you ask for "the names of , the eight publishers and their affiliates that would make up one-twelfth of the publisher votes (excluding the top ten, Carl Fischer, and G. Schirmer)". Those eight are the following:

> Emil Ascher, Inc. Irving Berlin Music Corp. Walt Disney Music Co. The Sam Fox Group Frank Music Corp. Joy Music, Inc. Melody Music, Inc. The Ralph Peer Group

As you know, several of the top ten publishers are not represented on the Board of Directors. Perhaps I should point out that four publishers not on the Board of Directors would have enough votes to elect a member of the Board. Those four are:

> The Bourne Group The Famous-Paramount Group The Lou Levy Group The Edwin H. Morris Group Sincerely,

HF:H

By HAND

Herman Finkelstein

[fol. 329]

EXHIBIT 17

CABLE ADDRESS "SOUTH MUSIC"

SOUTHERN MUSIC PUBLISHING COMPANY, INC.

1619 BROADWAY - AT FORTY-NINTH STREET

NEW YORK 19, N. Y.

[Emblem]

August 19, 1959

Mr. Richard Murray American Society of Composers,

Authors and Publishers 575 Madison Avenue New York 21, New York

Dear Mr Murray:

I wonder if you would be kind enough to give to me a list of the Publisher Members of the board of ASCAP, along with the publishers which they control. I believe that you once told me that the board under the new system of voting would control 41% of the votes. I would like to determine how this total is arrived at, in other words, how many votes each publisher member controls through his various owned or controlled companies.

Thanking you in advance, I am,

. Sincerely yours,

SOUTHERN MUSIC PUBLISHING COMPANY, INC.

J. L. Lister

JLL:la

[fol. 330]

Ехнівіт 18

August 26, 1959.

Mr. J. L. Lister

Southern Music Publishing Company, Inc.

.1619 Broadway

New York 19, N. Y.

Dear Mr. Lister:

As requested in your letter of August 19, there is enclosed a list of the publisher members of the Board of Directors and the companies which they represent.

The votes will be distributed as follows:

The greatest number of votes of firms affiliated with any one publisher member of the Board is 424. The next highest member is 394; 3 will be between 108 and 253; 3 between 39 and 98, and 4 between 1 and 6 votes.

The total number of publisher votes based on the latest available year will be 4,908 of which slightly over 30% will be represented on the Board of Directors.

If you will give me the list of the publishing firms of ASCAP in which Southern Music Publishing Company or Ralph Peer have an interest, I shall be happy to give you their votes and the manner in which they are computed.

The reference in your letter to 41% of the publisher. votes under the new system must be to something you read in the trade papers. I do not recall discussing it with you at any time. It probably refers to the top ten publishers, not all of whom are on the Board. The votes of the top ten aggregate 37.1%. Under the proposed order, the aggregate votes of the top ten could increase by not more than 10% or to an aggregate of 41%.

The basis of computing votes is set forth in the proposed consent order at pages 9 to 10 of the booklet sent to the membership on July 10, 1959.

Sincerely yours,

R. F. Murray

enc.



[fol. 330a]

of Handwritten notation-list as sent 8/26/59].

PUBLISHER MEMBERS OF BOARD AND THEIR PUBLISHING HOUSES

Louis Bernstein:

COLUMBIA PICTURES MUSIC CORPORATION
MOOD MUSIC COMPANY, INC.

SHAPIRO, BERNSTEIN & COMPANY, INC.
SKIDMORE MUSIC COMPANY, INC.

J. J. BREGMAN:

Bregman, Vocco & Conn, Inc.
Chatham Music
Lombardo Music, Inc.
Rosemeadow Publishing Corp.
Supreme Music Corp.
Triangle Music Corp.
Vernon Music Corp.

HIVING CAESAR:

IRVING CAESAR

FRANK H. CONNOR:

CARL FISCHER, INC. FILLMORE MUSIC HOUSE

MAX DREYFUS:

A-M Music Corporation
Buxton Hill Music Corporation
Chappell & Company, Inc.
De Sylva, Brown & Henderson, Inc.
Elar Music Corp.
G & C Music Corporation
Gershwin Rublishing Corporation
Samuel Goldwyn Music Publishing Corporation
T. B. Harms Company
Ivy Music Corp.
Jubilee Music

Lowal Corporation
McHugh and Adamson Music, Inc.
Mutual Music Society, Inc.
The Players Music Corporation
Putnam Music
Stratford Music Corporation
Williamson Music, Inc.
Victor Young Publications, Inc.

BERNARD GOODWIN:

LIVINGSTON AND EVANS, INC. NORTHRIDGE MUSIC Co.

JOHN D. MARKS:

ST. NICHOLAS MUSIC, INC.

JACK MILLS:

AMERICAN ACADEMY OF MUSIC, INC.
MILLS MUSIC, INC.
THE B. F. WOOD MUSIC COMPANY

RUDOLF TAUHERT:

G. SCHIRMER, INC.

[fol. 330b] MAURICE SCOPP:

LEO FEIST, INC.
WALTER JACOBS, INC.
LION MUSIC CORP.
MILLER MUSIC CORPORATION
PINE RIDGE MUSIC, INC.
ROBBINS MUSIC CORPORATION
VARIETY MUSIC, INC.
VILLA MORET, INC.

HERMAN STARR:

Advanced Music Corporation Atlas Music Corporation Harms, Inc. New World Music Corporation
Remick Music Corporation
Shubert Music Publishing Corp.
Victoria Publishing Company
M. Witmark & Sons

ADOLPH VOGEL:

ELKAN-VOGEL Co., INC.

[fol. 331]

Ехнівіт 19

CABLE ADDRESS "SOUTHMUSIC"

SOUTHERN MUSIC PUBLISHING COMPANY, INC. 1619 Broadway — at Forty-ninth Street New York 19, N. Y.

[Emblem]

September 1, 1959

Mr. Richard Murray American Society of Composers, Authors and Publishers 575 Madison Avenue New York 22, New York

Dear Mr. Murray:

I wonder if you could provide me with a list of the 12 publisher members of the Board in 1940 prior to the inception of the first consent decree, and then a list of the Board members each year after that or at least indicate the changes each year which occurred on the Publisher Board.

Thanking you in advance, I am,

Very truly yours,

J. L. Lister

JLL:zs

[fol. 332]

Ехнівіт 20

MURRAY HILL 8-8800

CABLE ADDRESS: ASCAP, NEW YORK

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS 575 Madison Ayenue New York 22, N. Y.

[Emblem]

September 9, 1959

c o

Y

Mr. J. L. Lister
Southern Music Publishing Company, Inc.
1619 Broadway
New York 19, N. Y.

Dear Mr. Lister:

In accordance with your letter request of September 1st, 1959, I am attaching a list of publisher members of the Board of Directors since 1940 and up to and including the present year 1959.

Sincerely yours,

R. F. MURRAY

enc.

[fol. 332a]

American Society of Composers, Authors and Publishers

Publishers — Board of Directors

1940 — 1959

1940

Louis Bernstein
Saul Bornstein
J. J. Bregman
Max Dreyfus
George Fischer
Walter Fischer
Jack Mills
John O'Connor
J. J. Robbins
Gustave Schirmer
Herman Starr
Will Von Tilzer

1942

Louis Bernstein
Saul Bornstein
J. J. Bregman
Max Dreyfus
Walter Fischer
Donald Gray
A. Walter Kramer
(Term Expired 4/1/42)
Jack Mills
R. F. Murray
John O'Connor
J. J. Robbins
Gustave Schirmer
Herman Stare

1941

Louis Bernstein SAUL BORNSTEIN J. J. BREGMAN MAX DREYFUS GEORGE FISCHER (Died 8/23/41) WALTER FISCHER A. WALTER KRAMER JACK MILLS R. F. MURRAY JOHN O'CONNOB J. J. ROBBINS GUSTAVE SCHIRMER HERMAN STARR WILL VON TILZER (Term Expired 8/27/41)

1943

Louis Bernstein
Saul Bornstein
J. J. Bregman
Max Dreyfus
Walter Fischer
Donald Gray
Jack Mills
R. F. Murray
John O'Connor
J. J. Robbins
Gustave Schirmer
Herman Starr

[fol. 332b]

American Society of Composers, Authors and Publishers
Publishers — Board of Directors
1940 — 1959

1944

Louis Bernstein
Saul H. Bourne
J. J. Bregman
Max Dreyfus
Walter Fischer
Donald Gray
Jack Mills
R. F. Murray
John O'Connor
J. J. Robbins
Gustave Schirmer
Herman Starr

1946

LOUIS BERNSTEIN SAUL H. BOURNE J. J. BREGMAN FRANK CONNOR MAX DREYFUS WALTER FISCHER (Died 4/46) DONALD GRAY JACK MILLS JOHN O'CONNOB ABE OLMAN J. J. ROBBINS (Resigned 5/40) LESTER SANTLY GUSTAVE SCHIRMER HERMAN STARR

1945

Louis Bernstein
Saul H. Bourne
J. J. Bregman
Max Dreyfus
Walter Fischer
Donald Gray
Jack Mills
R. F. Murray
(Resigned 12/20/45)
John O'Connor.
J. J. Robbins
Lester Santly
Gustave Schirmer
Herman Stark

1947

Louis Bernstein
Saul H. Bourne
J. J. Bregman
(Term Expired 3/47)
Irving Caesar
Frank Connor
Max Dreyfus
Donald Gray
Jack Mills
John O'Connor
Abe Olman
Lester Santly
Gustave Schirmer
Herman Starr

[fol. 332c]

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS
PUBLISHERS — BOARD OF DIRECTORS
1940 — 1959

1948

Louis Bernstein
Saul H. Bourne
Irving Caesar
Frank Connor
Max Dreyfus
Donald Gray
Jack Mills
John O'Connor
(Term Expired 3/48)
Abe Olman
J. J. Robbins
Lester Santly
Gustave Schirmer

1950

HERMAN STARR

Louis Bernstein
Saul H. Bourne
Ibving Caesar
Frank Connor
Max Dreyfus
Donald Gray
Jack Mills
Abe Olman
J. J. Robbins
Lester Santly
Gustave Schirmer
Herman Stabr

1949

LOUIS BERNSTEIN
- SAUL H. BOURNE
IRVING CAESAR
FRANK CONNOR
MAX DREVFUS
DONALD GRAY
JACK MILLS
ABE OLMAN
J. J. ROBBINS
LESTER SANTLY
GUSTAVE SCHIRMER
HERMAN STARR

1951

Louis Bernstein
Saul H. Bourne
Irving Caesar
Frank Connor
Max Dreyfus
Bernard Goodwin
Donald Gray
Jack Mills
Abe Olman
J. J. Robbins
Lester Santly
(Term Expired 3/51)
Gustave Schirmer
Herman Stark

[fol. 332d7

American Society of Composers, Authors and Publishers
Publishers — Board of Directors
1940 — 1959

1952

Louis Bernstein
Saul H. Bourne
Irving Caesar
Frank Connor
Max Dreyfus
Bernard Goodwin
Donald Gray
Jack Mills
Abe Olman
J. J. Robbins
Gustave Schirmer
Herman Stare

1954

Louis Bernstein
Saul H. Bourne
Irving Caesar
Frank Connor
Max Dreyfus
Bernard Goodwin
Donald Gray
Jack Mills
Abe Olman
J. J. Robbins
Gustave Schirmer
Herman Starb

1953

LOUIS BERNSTEIN
SAUL H. BOURNE
IRVING CAESAR
FRANK CONNOR
MAX DREYFUS
BERNARD GOODWIN
DONALD GRAY
JACK MILLS
ABE OLMAN
J. J. ROBBINS
GUSTAVE SCHIRMER
HERMAN STARR

1955

Louis Bernstein
Saul H. Bourne
Irving Caesar
Erank Connor
Max Dreyfus
Bernard Goodwin
Donald Gray
Jack Mills
Abe Olman
J. J. Robbins
Gustave Schirper
Herman Starb

[fol. 332e]

American Society of Composers, Authors and Publishers
Publishers — Board of Directors
1940 — 1959

1956

LOUIS BERNSTEIN
SAUL H. BOURNE
IRVING CAESAR
FRANK CONNOR
MAX DREYFUS
BERNARD GOODWIN
DONALD GRAY
JACK MILLS
(Resigned 6/57)
ABE OLMAN
(Resigned 4/56)
J. J. ROBBINS
GUSTAVE SCHIRMER
MAURICE SCOPP
HERMAN STARR

1957

Louis Bernstein SAUL H. BOURNE (Died 11/57) BONNIE BOURNE J. J. BREGMAN ERVING CAESAR FRANK CONNOR MAX DREYFUS BERNARD GOODWIN DONALD GRAY (Term Expired 3/57) JOHN D. MARKS JACK MILLS J. J. ROBBINS (Term Expired 3/57) GUSTAVE SCHIRMER MAURICE SCOPP HERMAN STARR ADOLPH VOGEL

1958

Louis Bernstein
Bonnie Bourne
J. J. Bregman
Irving Caesar
Frank Connor
Bernard Goodwin
John Marks
Jack Mills
Gustave Schirmer
Maurice Scopp
(Term Expired 3/59)
Herman Starr
Adolph Vogel

1959

Louis Bernstein
J. J. Bregman
Irving Caesar
Frank Connor
Max Dreyfus
Bernard Goodwin.
John D. Marks
Jack Mills
Maurice Scopp
Gustave Schirmer
Herman Starr
Rudolph Tauhert
Adolph Vogel

[fol. 333]

Ехнівіт 21

CABLE ADDRESS "SOUTH MUSIC"

SOUTHERN MUSIC PUBLISHING COMPANY, INC. 1619 Broadway — at Forty-ninth Street New York 19, N. Y.

[Emblem]

September 8, 1959

Mr. Richard Murray
American Society of Authors, Composers
and Publishers
575 Madison Avenue
New York 21, New York

Dear Mr. Murray:

On Page 37 of Mr. Dean's remarks to the members of the Society on September 4th, he mentions there are four (4) publisher members not presently represented on the Board, who together, have enough votes to elect a member of the Board. I would appreciate very much if you could give me the names of those four (4) members.

Very truly yours,

/s/ J. L. LISTER J. L. Lister

JLL:zs

FILE COPY VOLUME II

TRANSCRIPT OF RECORD

Supreme Court of the United States OCTOBER TERM, 1960

No. 56.

0

SAM FOX PUBLISHING COMPANY, INC., ET AL., APPELLANTS,

US.

UNITED STATES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1960

No. 56

SAM FOX PUBLISHING COMPANY, INC., ET AL., APPELLANTS,

vs.

UNITED STATES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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[fol: 334]

Ехнівіт 22

September 9, 1959

Mr. J. L. Lister Southern Music Publishing Company, Inc. 1619 Broadway New York 19, N. Y.

Dear Mr. Lister:

Replying to your letter of September 8, the publishers referred to by Mr. Dean are:

The Edwin H. Morris companies;
The Famous-Paramount companies;
The Bourne companies, and
The Lou Levy companies.

· Sincerely yours,

R. F. MURRAY

[fol. 337]

United States District Court
Southern District of New York
Civ. 13-95

United States of America, Plaintiff, . vs.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., Defendants.

Transcript of Proceedings of October 19 and 20, 1959

Before: Hon. Sylvester J. Ryan, District Judge.

New York, October 19, 1959, 10 A.M.

APPEARANCES:

Richard B. O'Donnell, Esq., Walter K. Bennett, Esq., Albert Karsted, Esq., and John L. Wilson, Esq., Attorneys, Department of Justice, for the Plaintiff.

Arthur H. Dean, Esq., Howard T. Milman, Esq., Herman Finkelstein, Esq., Ferdinand Pecora, Esq., Lloyd Cutler, Esq., David H. Horowitz, Esq., Frederick A. Terry, Jr., Esq., and Thomas L. Finkelstein, Esq., Attorneys for Defendants.

[fol. 338] Colloquy between Court and Coursel on Motions for leave to Intervene and to be Heard

The Court: We have the application of the United States of America, plaintiff, against American Society of Composers, Authors and Publishers, file number Civil 13-95. This application is made by both the plaintiff and the defendant for approval by the Court of a proposed amendment to the amended-consent decree.

I understand it comes on with the consent now of both the plaintiff and the defendant?

Mr. O'Donnell: That's right, your Honor.

The Court: The Court provided by an order that it signed several months ago that notice of this application should be given to the members of the Society and that the proposed amendment to the amended consent decree should be duly promulgated. Has that notice been given?

Mr. O'Donnell: Yes, it has, your Honor.

The Court: And you have filed with the Court the affidavit showing compliance?

Mr. Milman: We have.

The Court: If not, I suggest you do so.

Mr. Milman: It has been done.

The Court: All right. During the interval I also directed, if not in a written order then in an order entered at [fol. 339] least orally, that any communications that were sent by the Society to its members be filed in the court. Has that been complied with?

Mr. Milman: That has been complied with, your Honor.

The Court: Now then, in the order, as I recall it, I provided that any interested party may today make application to be heard and I would then pass upon the application. Is there anybody here present, other than the plaintiff or the defendant, who desires to be heard by the Court?

Mr. Eastman: I do, your Honor.

The Court: State your name and address and whom you

represent.

Mr. Eastman: My name is Lee V. Eastman of the firm of Eastman, Bronstein & Van Veen at 400 Madison Avenue, New York City, New York. I represent a group of roughly 60 writers, all members of ASCAP, who constitute themselves a committee called the Current Writers Committee. I should like to appear on their behalf.

The Court: Have you made a formal application of any

nature!

Mr. Eastman: I have not, your Honor. I wrote you [fol. 340] a letter and you said you would deem that an application.

The Court: I take it then that you make no application

to formally intervene in this suit.

Mr. Eastman: At this time I have not, your Honor.

The Court: Now, do I also understand that all of the individuals or corporations whom you represent here today are members of the defendant Society?

Mr. Eastman: They are, your Honor.

The Court: It seems to me then, being members of that Society you have surrendered your right to appear as individuals and you must be heard through the Society. However, to assist the Court I will permit you later on to make any comments or observations that you desire as a friend of the Court.

Mr. Eastman: Your Honor, I should like-

The Court: By doing that I don't recognize that you have any legal status or standing in this proceeding.

Mr. Eastman: Your Honor, on that point then I should

like to move to intervene:

The Court: Your motion is denied. If you want a formal order on that, you may submit it. It is denied for the rea-[fol. 341] sons that I have indicated. You are not a party to this suit. The suit has gone to final decree and judgment, and you are still members of the defendant Society and have surrendered your right in so far as this suit is concerned to appear individually. However, I will permit you to be heard as a friend of the Court.

Mr. Eastman: Thank you, your Honor.

The Court: So that I might get the benefit of any observations that you may have to make. Your full name is what?

Mr. Eastman: Lee V. Eastman.

The Court: Have you filed any papers which shows the ? members of this committee?

Mr. Eastman: No, I have not, your Honor, but I would

be very glad to do so.

The Court: I think it would be helpful if you did, if you stated just who are the members of this committee in some formal paper so that I might have it on the record, and whom this committee represents.

Mr. Eastman: Your Honor, we didn't have a file tabula-

tion. That is why I did not file that.

The Court: Suppose you do it within the next 48 hours. [fol. 342] Mr. Eastman: Fine, your Honor. May I offer a brief to you in the meantime, your Honor?

The Court: Yes, if you give copies of it to both the de-

fendant's attorneys and the plaintiff's attorneys.

Mr. Eastman: I would be delighted to do so. May I also have the benefit of their briefs as well?

The Court: I can't do that because I don't know how many are going to intervene, but you may have access to such briefs as have been filed with the Court. You would accommodate me, Mr. Eastman, if you would give me two extra copies because it is my unfortunate custom to mark up briefs with my notations as I read them.

Mr. Eastman: I shall be very glad to do so. Thank you,

your Honor.

The Court: I will hear you later, Mr. Eastman, as a friend of the Court.

Mr. Cheyette: Your Honor, my name is Herbert Cheyette of 11 West 60th Street. I should like to move the admission to this court pro hac vice of Mr. Charles Horsky and Mr. Alvin Friedman of the Washington, D. C., bar.

The Court: I would be very happy to have them admitted for the purpose of making any application that they desire to make and for the purpose not of appearing in this suit

[fol. 343] as a right but of addressing the Court.

Mr. Horsky: Thank you, your Honor. We have filed a formal motion for leave to intervene on behalf of four publishing firms which I think you have copies of.

The Court: Yes. Let me get your papers. I know I have

them here.

Whom do you represent?

Mr. Horsky: Four publishers who are listed in the first paragraph of the document which you have there.

The Court: Do I understand that you represent the Sam

Fox Publishing Company, Inc.?

Mr. Horsky: .That's right.

The Court: According to your petition they have been a member of the defendant Society since 1924?

Mr. Horsky: Yes, sir.

The Court: And I assume that they are still members.

Mr. Horsky: That's right.

The Court: And you represent Movietone Music Corporation which has been a member of ASCAP since 1932?

Mr. Horsky: Correct.

The Court: And I assume that corporation is also a member yet.

[fol. 344] Mr. Horsky: Yes, sir.

The Court: And third is the Pleasant Music Publishing Corporation which, it is recited, has been a member of ASCAP since 1941. I assume that corporation is still a member of the defendant Society?

Mr. Horsky: Correct.

The Court: And the fourth applicant, Jefferson Music Company, is a member of ASCAP since 1945?

Mr. Horsky: That is correct, and it still is a member. The Court: Your application to intervene is denied. Mr. Horsky: May I be heard on that, your Honor!

The Court: I will hear you later on, if you want to, but I have examined the law on the subject. You are members of the defendant Society, and I feel that you have therefore surrendered your right to intervene as individuals. I also feel at this time, this suit having proceeded to final judgment by consent, that it will serve no useful purpose and will not promote the interests of the administration of justice or the accomplishment of the purposes of this suit to permit you to intervene. For those reasons—and, if neces-

sary, I will write a memorandum on it although I would [fol. 345] prefer not to do so—your application to intervene is denied. You may have an exception. You may submit a formal order so that, in the event you feel aggrieved, you may take any appropriate steps that you desire.

However, I will grant to you the same privileges that I have indicated I will grant to Mr. Eastman. I will permit you not to appear in this suit, but I will permit you to address the Court as a friend of the Court so that the Court might have, in determining whether or not the proposed amendment to the consent decree should be entered, the benefit of your observations and your comments. They may be helpful.

You will be heard, if you desire, later on as a friend of the Court. You may have an exception to my ruling deny-

ing your right to intervene.

Mr. Horsky: I wonder if you would let me argue my motion to intervene. I think I can persuade you that this is different from most of the cases you have looked up in your researches. If you are persuaded you will not change your mind, then I will not waste your time.

The Court: Mr. Horsky, I am not one who believes, in my functioning here as a judge, that I possess infallibility. I have not been divinely ordained to perform any of my [fol. 346] duties. Perhaps, when I hear you as a friend of the Court, you may then go into this subject as to your

possible right to intervene.

Mr. Horsky: All right, your Honor: My associate, Mr. Friedman, I would like to have you note is also appearing with me, Alvin Friedman, both of the District of Columbia.

The Court: All right. I will be very happy to hear you

later on as a friend of the Court.

[fol. 347] Mr. O'Donnell: The Government has a memo-

randum in opposition.

The Court: If you will just let me try to establish a little order here, we may get somewhere, and I will hear you in due time.

Mr. Fishbein: My name is Arthur L. Fishbein of the firm of Fishbein & Okun, 67 West 44th Street. I appear here

on behalf of five publishing members of ASCAP, your ...

I submitted a memorandum which was served on your

Honor's clerk, I believe last Thursday.

The Court: Yes. I had occasion to look at it, not to study it with care, but I would like to and I hope to before I render my final decision.

Will you state whom you represent so that we may have -

it on the record.

Mr. Fishbein: Charles K. Harris Music Publishing Com-

The Court: I have your papers. Is Charles K. Harris a member of ASCAP!

Mr. Fishbein: Yes, sir.

The Court: Southern Music Publishing, are they members of ASCAP1

Mr. Fishbein: Yes, sir.

[fol. 348] The Court: LaSalle Music Publishers, successors to Kornheiser & Schuster, are members of ASCAP? Mr. Fishbein: Yes, sir.

The Court: And RFD Music Publishing are also members of ASCAP1

Mr. Fishbein: Yes, sir.

The Court: And Panther Music Corporation is also a member?

Mr. Fishbein: Yes, sir.

The Court: I understand you make no application to intervene in this suit.

Mr. Fishbein: No, I don't make an application to inter-

vene, but I make an application to be heard.

The Court: I will permit you to appear, Mr. Fishbein, as a friend of the Court, not recognizing that you have any legal status in this matter which entitles you as a matter of right to be heard. I will hear you as a friend of the Court because I seek all the guidance that I can secure.

Mr. Fishbein: Thank you.

The Court: Is there anybody else who desires to be heard?

[fol. 349] Mr. Rothstein: My name is Sidney W. Rothstein, 315 Broadway, New York City. I represent Gem Music Corporation and Denton & Haskins Corporation, two

publishing members of ASCAP; also Barney Young, a writer member of ASCAP. I had advised your Honor by letter dated August 18 of this year of my desire to be heard in this matter. I made no formal application to intervene today because I had previous interventions on behalf of these same clients before your Honor and your Honor had denied them on the grounds that you stated this morning.

I would like, however, to be heard on behalf of these

people as a friend of the Court.

The Court: I will permit you to be heard at the proper time that we allot to the friends of the Court.

Mr. Rothstein: Thank you. The Court: Anybody else?

Mr. Schaeffer: My name is Morton Schaeffer. I am admitted to the Bar of the State of Illinois, and my firm is Schaeffer & Schaeffer. I represent the following music publishers:

Will Rosseter of Chicago;

Luke Publishing Company of Chicago; [fol. 350] Ray Music Company of Chicago;

Consolidated Music Publishers of New York;

Lewis Publishing Company of New York; ...

Frederick Music Company of Chicago;

Windy City Music Company of Chicago;

Forrester Music Publishers, Inc., of Chicago;

Clarion Music Company of Chicago;

Lexington Music Company of Chicago;

Mike Aury Music Publishers of Chicago;

Midway Music Company of Chicago;

Haywire Music of Hollywood, California;

Novelty Music Company of Hackensack, New Jersey; and

Orton Music of Chicago.

I make application, your Honor, to be heard.

The Court: You make no application to intervene?

Mr. Schaeffer: No, no application to intervene.

The Court: I will hear you not as a matter of right but as a friend of the Court, the same as I have indicated I would hear the other gentlemen who have made previous.

[fol. 351] applications. I will be very happy to have you here.

Mr. Zissu: Your Honor, I am Leonard Zissu of the law firm of Zissu, Marcus, Ebenstein & Stein. I assume my position, pursuant to your Honor's ruling, would be the same as the others?

The Court: I don't preclude you from making any ap-

plication that you feel advised to make.

Mr. Zissu: Then I will make the formal application to intervene.

The Court: On whose behalf?

Mr. Zissu: On behalf of some 142 ASCAP author mem-

The Court: They are all members?
Mr. Zissu: All members of the Society.

The Court: May I suggest that during the day or during tomorrow you file with the Court a statement of just whom you represent.

Mr. Zissu: I have that here now in a short three or

four page memorandum, your Honor.

The Court: I will be very glad to have one. Give one to each of the attorneys who appear here for the plaintiff and for the defendant.

[fol. 352] Mr. Zissu: All right. Thank you.

The Court: I take it then that you do not make a formal application to intervene?

Mr. Zissu: I did, your Honor.

The Court: Well, your motion is denied. If you want a formal order entered on it, you may submit it so that you may have a record on which you may act. But I deny your application to intervene for the same reasons I have denied the applications of the others similarly situated. I will, however, hear you as a friend of the Court if you desire to be heard in addition to your memorandum.

Mr. Zissu: Thank you, your Honor.

The Court: Anybody else?

Mr. Niles: My name is Edward Niles of Cadwalader, Wickersham & Taft. We represent Handy Bros. Music Company, Inc., a wholly-owned corporation of the estate of W. C. Handy. I do not ask to intervene. I ask the privilege

of speaking as a friend of the Court, if that seems advisable in the course of the proceedings.

The Court: I will be very happy to hear you, Mr. Niles.

later on as a friend of the Court.

Mr. Kaufman: If it please the Court, I appear on be-[fol. 353] half of several writer members of ASCAP and I merely make an application to be heard at the appropriate time as a friend of the Court.

The Court: Your name, sir?

Mr. Kaufman: Bernard Kaufman, 570 Seventh Avenue, New York City.

The Court: May I suggest that within 48 hours you file a statement as to whom you represent?

Mr. Kaufman: I shall gladly do so.

The Court: And you make no formal application to intervene?

Mr. Kaufman: No formal application to intervene.

The Court: I will be very happy to hear you as a friend of the Court.

Anybody else now?

Counselor, step right up.

Mr. Battle: My name is Edgar Battle. I am a songwriter member and a publisher member of ASCAP. I would like to be heard as a friend of the Court.

The Court: Are you a member of the Bar!

Mr. Battle: No. sir.

The Court: You are not a member of the Bar?

Mr. Battle: No, sir, I am not a lawyer.

[fol. 354] The Court: Maybe you are more fortunately situated, I will be glad to hear you later on. Your first name is what?

Mr. Battle Edgar. The Court: All right, Mr. Battle.

Anybody else!

I take it then that nobody else appears and desires to be heard. The procedure of the Court will be this, and if there is any opposition to it I will be glad to hear you as to suggestions as to the procedure:

First I was going to call upon the Attorney General representing the plaintiff United States of America to give him an opportunity to explain the proposed amondments in brief and to tell us their purpose and to give us some of the background which gives rise to this present proceeding. After we have heard from the Attorney General I will then call upon the attorney for the defendant Society and he would be afforded a similar opportunity to explain his views as to the proposed amendments to the consent judgment which we now have and to explain them in detail and to indicate to the Court why in the opinion of both himself and of his client he feels they are just and proper [fol. 355] amendments designed to accomplish the purposes of the suit.

After that I would hear from Mr. Eastman and Mr. Chevette and Mr. Fishbein, Mr. Rothstein, Mr. Schaeffer and Mr. Zissu, then Mr. Niles, then Mr. Kaufman, then Mr. Battle. After we have heard from them we will then permit the Government to make a further statement, if they desire, and we will permit the defendant to make a further statement if they desire to do so.

Is there any objection to that procedure?

Is it contemplated that there will be no testimony taken? I understand that the Government desires to offer no testimony?

Mr. O'Donnell: No, your Honor.

The Court: Does the defendant desire to offer any testimony?

Mr. Dean: No, your Honor.

DISCUSSION OF DECREE

The Court: If we have no offer of testimony, then, we will just proceed to a discussion of the decree. I have set aside the entire day today and the entire day tomorrow to listen to this matter. Within the limits of judicial endurance

and of human patience I will try to do so.

[fol. 356] I do wish, however, that as you gentlemen speak and address yourselves to the provisions of this amended decree that you try not to be too repetitious and don't repeat at great length objections made by other parties. However, if you feel that the objection that has been made by somebody else is in line with your thoughts, if you desire to make an observation on that I won't limit you in doing

so. All I ask is that as you speak bear in mind that I am only made of flesh and blood and I can endure only so much, and I would appreciate it if you would try not to be repetitious and come right down to what are the essential points of your statement.

All right. Is there any objection to this procedure that

I have outlined?

Does anybody have an objection?

There being no objection voiced, we will proceed then

to hear first from the Attorney General.

Take your time, and I suggest that you don't make it a confidential address to the Court alone but let everybody hear what you have to say. Short of making it a political address, you may take that podium over there on the side, [fol. 357] so that you are addressing the Court and the people here. They are entitled to know what you have to say. If you do that, that will be helpful.

STATEMENT BY MR. C'DONNELL

Mr. O'Donnell: Your Honor, before we go into the six substantive sections of the new judgment, I would like to make a suggestion about the seventh section which is the

procedural section.

Both ASCAP and the Government would like to withdraw that section. We would like to do that on the understanding that some time after the conclusion of this hearing, if your Honor decides to approve the other six sections of the judgment, we would expect that your Honor would notify us either by opinion or by telephone call or in any way whatever and, that having happened, we would then set in motion the procedures for amending the ASCAP articles.

The Court: Do you want me to take this piecemeal then? What is this seventh section that you want to withdraw by

consent? What does it provide?

Mr. Q'Donnell: That is the section, your Honor, which has an unfortunate implication in it. It seems to imply that the Court is somehow subject to the vote of the ASCAP [fol. 358] membership, and we are trying to get rid of that implication, which we regret, and we thought the best way

to do it was to just withdraw the entire section, Section VII.

The Court: Now let me see if I understand this further.

Do I understand now that ASCAP comes in today and unequivocally, without reservation, gives its consent to the proposed amendments to the amended decree?

Mr. O'Donnell: No, your Honor.

The Court: Then I think we had better leave it in and so I will modify it.

⁶ As I understand it, Mr. Dean, what is intended here is

this, and if I am wrong please correct me:

You presented a proposed amendment to the consent decree for judicial approval, and while you have consented to it for the purpose of submitting it to the Court you have done so with the reservation that you cannot give your full consent to it until it has been approved by the members of your Society at a regular meeting on notice.

Mr. Dean: Yes, sir.

[fol. 359] The Court: And that you cannot as a matter of mechanics call such a meeting and submit this proposed amended decree to your Society for the purpose of getting their consent and you, in turn, conveying an unqualified and unrestricted and unlimited consent to the Court until you first have some indication that the Court will approve it.

Mr. Dean: That is correct, your Honor.

The Court: I think we had better leave that Section VII in, and I will modify it. My position is that I will not approve a decree which is subsequently subject or subject to subsequent ratification by anybody. That would be a surrender of my judicial prerogatives of which at times I am very jealous.

I will indicate at the conclusion of this hearing whether or not the proposed consent decree will meet with my approval. I will not sign the decree until and unless the defendant ASCAP conveys and files in writing its unqualified, unlimited and unrestricted consent to the decree that I find to be just and proper.

Mr. Dean: That procedure is entirely satisfactory to

ASCAP, your Honor.

[fol. 360] The Court: Is that procedure satisfactory to the Government?

Mr. O'Donnell: Yes, your Honor.

The Court: Has anybody any objection to that?

In that respect, then, provision VII will be deemed modified but will not be stricken from our considerations.

Mr. O'Donnell: May it please the Court, the ASCAP complaint was filed in February, 1941 and was followed by a consent judgment in March, 1941.

The antitrust purposes of the suit were twofold: First we wanted to put curbs on ASCAP's licensing practices so that it could not use its control of music, which was very considerable, to injure users of music unreasonably.

Secondly, because we looked on members of ASCAP as competing entrepreneurs, we wanted to insure freedom of competition for these members within the framework of the Society.

The judgment was amended in 1950, and in that judgment there was a considerable amount of relief which was considered useful in preventing the elimination of competi[fol. 361] tion between members and between members and outsiders.

By 1956 the Department had begun an investigation of ASCAP's compliance with the 1950 judgment. This disclosed, in our opinion, that in order to achieve the purpose of protecting the competitive opportunities of the members it would be necessary to spell out more specifically how the judgment should be carried and in part to secure some supplementary relief implementing the 1950 judgment.

During that period a number of members came in to the Department with complaints and suggestions. Some of these were useful and some were unrealistic in the overall context of the case. However, all were welcome and all

suggestions were considered.

We very quickly discovered that when one is dealing with the affairs of 6000 people it is not possible to please everyone no matter what we do.

The Court: May I ask at this point—suppose I get this

information from Mr. Dean.

How many members has ASCAP today and in what categories do they fall? For instance, how many composers, [fol. 362] how many authors, how many authors, how many publishers, if you have those figures?

Mr. Dean: We have 6400 authors and composers and approximately 1100 publishers.

The Court: So you have a total membership then of

about 7500 divided into two groupings.

Mr. Dean: Let me withdraw that, your Honor. There are 1100 publishers and there are 5300 writers. That makes an aggregate membership of 6400.

The Court: May I ask one more question.

Mr. Dean: Yes, your Honor.

The Court: What is the relationship of that membership, the number of that membership today, to what it was in 1950? Have you any information?

Mr. Dean: May I defer to Mr. Finkelstein on that? The Court: Mr. Finkelstein, has it remained more or less constant, or has it doubled, or is it a trade secret?

Mr. Finkelstein: I think it was about 2000 in 1950, your Honor. I think about 100 members are taken in each month at the present time.

[fol. 363] The Court: New members? Mr. Finkelstein: New members, yes.

The Court: All right.

[fol. 364] Mr. O'Donnell: By 1958, your Honor, we had begun negotiating with ASCAP, and these negotiations have now ended in a judgment which we recommend to the Court as being suitable for carrying out the antitrust purposes of the suit.

This judgment consists of six substantive sections which we would like to comment on separately, and on the government side, within the government staff, we have divided up our presentation in such a way that I would like to talk about I, II, and IV and have Mr. Bennett talk about III, V and VI.

As to Section I of the proposed judgment, that takes us back to Section IV(G) of the 1950 judgment which enjoined ASCAP from restricting the right of any member to withdraw from membership on three months' notice. We discovered that, while there was perhaps no intentional restriction on a resignation and, therefore, no wilful contempt on the part of ASCAP, its rules of distribution taken together with its membership contract amounted to a loophole that we had not foreseen in 1950. ASCAP was not

preventing members from resigning, but it was erecting economic obstacles.

Under the present practice, when a member resigns, he continues to share in ASCAP's revenue from licenses in [fol. 365] effect but his share is very much reduced despite the fact that his music is helping to produce ASCAP revenue just as if he were still a member of the Society.

As to revenue from future licenses, and these are possible whenever a co-writer or a publisher remains in ASCAP, he gets no share whatever at the present time, and once again you find that the resigning member's music is helping to produce income for ASCAP though he gets nothing in return. Moreover, he has problems when he leaves ASCAP in licensing his catalog because for the most part he finds that users already have a license from his co-writer who is in ASCAP. But even if he should be lucky enough to find a customer, there is a serious legal question as to whether or not he has a right to license his music after it has already been licensed by a co-writer or a publisher.

The net result is that a resigning member is very likely to find that he has lost the value of his existing catalog.

We tried to deal with this in Section I of the proposed new judgment. That provides that as to revenue from licenses in effect at the time of resignation a resigning member must receive distribution on the same basis as a mem[fol. 366] ber. As to revenue from future licenses, so long as any co-writer or publisher remains in ASCAP the resigning member may elect to continue to receive distribution on the same basis as a member provided that he agrees not to try to license his work to any other performing rights organization.

We think that, if the new judgment is entered, there will no longer be any economic penalty upon a resignation. It does provide, however, that ASCAP, if it treats all members alike, all resigning members, may deny a resigning member the option to receive distribution on any basis other than current performance. We had no objection to that because it seemed to us that it would not make sense to force ASCAP to pay a resigning member on any other basis because the other basis would include seniority and that is a

factor which the resigning member obviously intended to

abandon when he resigned.

The Court: Perhaps at this point it might be well to ask if any of the nine attorneys who have appeared here find any objection, including Mr. Battle, to this provision.

Apparently, then, that is one thing that everyone agrees

on.

All right, Mr. Dean, you need not comment on that. Ap-[fol. 367] parently there is no objection to that. So, unless you feel it necessary when it is your occasion to speak, you don't have to talk about it. Nobody else is objecting to it.

Mr. Dean: No, sir. When this matter was called to our attention we wanted to try to be as fair and equitable to the resigning member as we could, and we worked out this provision with the Department of Justice, and it seems to us to be a fair and equitable provision.

The Court: Apparently you have accomplished what might perhaps have seemed impossible. Everybody is satisfied. All right. That is all right. There is no objection to

that part. That is out the window.

Mr. O'Donnell: Now we come to Section II.

The Court: I want, by these observations, to focus my attention upon the real problem that is before me. All right.

If any of you object to this procedure, speak up.

Mr. O'Donnell: Section II of the new judgment is an implementation of Section XI of the 1950 judgment. That required ASCAP to make distribution on a basis which gave primary consideration to performances indicated by objective surveys. There was actually only one adjective [fol. 368] in that 1950 judgment which specifically told ASCAP what kind of survey it must conduct, and that is the word "Objective." I mention that so that your Honor will see what a difficult problem it would have been for the government if we had tried to think in terms of a contempt proceeding against ASCAP in connection with perhaps not carrying out the counterpart of the present Section II.

I should also say that during all this period since 1950 ASCAP has provided the government with copies of all of its rules and regulations and its changes of its rules and regulations which would also, of course, have made it pretty

hard to proceed via the contempt route.

Though I say that there is only one adjective in that 1950 judgment, the word "objective," I think that a fair interpretation of the whole paragraph is a necessary implication that the surveys ought also to be adequate and fair. Our investigation disclosed that ASCAP's survey has been inadequate in a number of respects.

The principal deficiencies of the old survey were these: The old survey over-emphasized network performances in that it received logs of each network and multiplied these by the number of stations in each network. It then took a very meager sample of local performances by tape. In [fol. 369] radio it used a multiplier of 20, and in television it used a multiplier of 60. These local multipliers we believe were inappropriate.

The result was that ASCAP was distributing one-third of its revenue on the basis of local performances and two-thirds on the basis of network performances.

The Court: If you don't mind my interrupting-

Mr. O'Donnell: Not at all.

The Court: —this proposal, then, affects only the manner in which the collections of ASCAP are to be distributed amongst its membership; is that correct?

Mr. O'Donnell; No, no. I am talking right now about Section II which affects only the attempts which ASCAP makes to determine how many times the songs of each of its members are played.

The Court: But the purpose of this survey is to give to ASCAP a formula—

Mr. O'Donnell: Yes. It will later be used for that purpose.

The Court: And it is to be the basis of a formula which doesn't affect the fees to be paid by others to ASCAP but simply determines in a measure the manner in which or the proportion in which ASCAP's collections are distributed. [fol. 370] Mr. O'Donnell: That's right. If you are going to pay the members, of course—

The Court: How much you are going to pay them.

Mr. O'Donnell: —you first have to determine how many times their music has been played.

The Court: All right. Now let me ask you this question: What power does this Court have to intervene in those matters as to how this money should be distributed amongst ASCAP, and where does this Court have the authority to intervene?

Mr. O'Donnell: The first answer—I don't suppose it is an entire answer—is that this Court has already gotten into that area in the 1950 judgment. The second answer is that the history of ASCAP shows that it rather obviously needs regulation, and if this Court doesn't do it there is no other authority that will.

The Court: So I understand then it is the contention of the government that the scope of this decree is to regulate not only the affairs of ASCAP in what I would call the consuming public but to regulate the affairs of ASCAP as

an entity amongst its various members.

Mr. O'Donnell: Yes, it is, your Honor. I think in a sense the Court is filling a vacuum here which no one else would [fol. 371] fill if the equity court does not do it. ASCAP is a very peculiar entity. It is a little bit like a public utility. It is a little bit like a labor union. It is a little bit like a cooperative. All of these other entities have federal regulation.

The Court: And you have charged that it is a little bit like a conspiracy.

(Laughter.)

Mr. O'Donnell: Yes. But I say that all these other entities are regulated by someone.

The Court: All right.

Mr.-O'Donnell: And if the Court won't do it there is no one who will. I suppose it would be politically unrealistic to assume that the government would ever set up a commission to regulate ASCAP. I think it is terribly regrettable that the Court has become enmeshed in all this work for 20 years, but I suppose it also should be said to the credit of the Court that it has accomplished something. The Court has protected to some extent the rights of a lot of writers and publishers of music.

The Court; All right.

Mr. O'Donnell: I was saying that the result of the overemphasis on network performances was that ASCAP was [fol. 372] distributing one-third of its revenue on the basis

A

of local performances, two-thirds on the basis of network performances which, strangely enough, reflected its receipts

from these media almost exactly in reverse.

It seemed to us that the performances on each media should be weighted in some approximate proportion to the revenue that is received from each media. Our rationale there was that the value of a song is best measured by what the users are willing to pay for it. We also thought that the local sample that was being taken by ASCAP was too small and we were troubled because other media such as restaurants, nightclubs and so on were not surveyed at all although they produce about 11 per cent of ASCAP's revenue.

That brings us to Section II(A) of the proposed new judgment which requires ASCAP to conduct either a census or a scientific sample of performances. This is what the government is most proud of in this section. The new judgment substitutes a scientific survey for a non-scientific survey.

There has grown up in recent years the new science of sampling which consists of a series of techniques that are designed to collect information within very small margins

[fol. 373] of error.

The Court: You don't refer to that Gallop poll, do you, that we had some years ago?

Mr. O'Donneli: Yes, I do, in part.

The Court: Wasn't there something in one of these Literary Digests that predicted the defeat of somebody?

Mr. O'Donnell: The Literary Digest fiasco occurred back in 1936.

The Court: Oh, since then it has improved?

Mr. O'Donnell: That's right.

The Court: All right.

Mr. O'Donnell: The Gallop poll in 1948 of course misjudged the Truman election.

The Court: Yes, yes.

Mr. O'Donnell: But that does not happen any more.

The Court: Oh, no. All right.

Mr. O'Donnell: It could, not happen again, I am told, your Honor.

The Court: You would be surprised. Of course you can't produce a Truman again, you know. After they produce a man like him they throw away the mold. Well, we will forget that. That is my own personal opinion. Perhaps I [fol. 374] shouldn't use this place to say these things. All right. Go ahead.

Mr. O'Donnell: I assert to the Court that this is a science. The Court: All right. You now propose to set up a system whereby there will be a real study made by men who

have specialized in the field?

Mr. O'Donnell: Yes, your Honor.

The Court: And that will be the basis for future distributions?

Mr. O'Donnell: Exactly.

The Court: Who is going to make this survey, and what

is the plan you are now proposing?

Mr. O'Donnell: In the first place, no mere lawyer would claim the ability to design the procedures that were necessary to accomplish this.

The Court: You would be surprised. I never have seen

such modesty attributed to the bar yet.

Mr. O'Donnell: I must say that at least the ASCAP lawyers and the government lawyers did not claim that ability, so we both consulted experts.

The Court: All right. I think that was good planning.

[fol. 375] The Court: (sic) The new plan in general is

this:

ASCAP is going to continue to receive logs from all television networks and from CBS and NBC radio networks, that is, logs of all commercial programs but not sustaining programs.

I should call your attention to the fact that ABC radio network is being dropped. ASCAP is not going to take logs from that network on the advice of its economic consultant. It is almost a misnomer to call it a network from our standpoint because, except for some religious music on Sunday, I understand that it has only one musical program, and that is "Breakfast Club." I am told that it pays ASCAP a very small amount of revenue, in fact much less than ASCAP receives from many local stations. So the economic consultant concluded—

The Court: Who is the economic consultant?

Mr. O'Donnell: Joel Dean Associates.

The Court: Are they recognized in the field?

Mr. O'Donnell: Yes, they are.

The Court: Joel Deán.

[fol. 376] Mr. O'Donnell: These people concluded that the cost of logging ABC was out of proportion to the revenue that was being obtained from it.

I also call your attention to the fact that ASCAP is not going to log sustaining programs on radio. That is not a television problem because we understand that on television there are no sustaining programs; practically everything is commercial.

A sustaining program is essentially a service that a network offers to its affiliated stations. They are free to use it constantly or infrequently or not at all. I suppose it comes down to the fact that they use it when they have nothing else to use.

The Court: To sort of fill in. They use it when the

time has not been sold; can't collect for it.

Mr. O'Donnell: That's right, and the network doesn't keep any record of how much or how little the different stations use it. It is not an income producing program for the network as are commercially sponsored programs.

Since it has not been possible to learn how often stations [fol. 377] have used a particular sustaining program, ASCAP in the past has been in the unhappy position of having to make fairly arbitrary guesses. For a time it has shown that 44 stations were using each sustaining program so that it multiplied by 44. Then it changed and it reduced its assumption to three. I believe that 44 was too high and three was probably too low. But it seems to us to make more sense to put the sustaining programs under the local survey where they should be picked up in approximate proportion to their actual use. Theoretically this should produce performance records very close to those of actual logs, if actual logs were obtainable, plus the information as to how many stations were using each program.

This is especially so because ASCAP is going to secure the music program list from the main office of the network on every sustaining program in addition to the local survey

work, so there shouldn't be any non-identification problem at all in connection with the local survey of sustaining programs.

Secondly, ASCAP's local survey is going to be increased by approximately 50 per cent, and better geographical [fol. 378] distribution is going to be maintained.

The Court: These are as a result of the recommen-

dations of Dean Associates?

Mr. O'Donnell: The recommendation of Dean Associates.

The Court: And of the Attorney General.

Mr. O'Donnell: As modified by the recommendations of our expert.

The Court: All right.

Mr. O'Donnell: Thirdly, ASCAP will attempt for the first time to survey night clubs and dance halls and wired music as an experiment to see if it is worth while to do this. .

Fourthly, the local samples will have to be randomly selected and appropriate blowup multipliers will have to be used so that each sample will be weighted in relation to the unsampled performances in the particular licensee's group from which it is taken. That is to say, if the sample was 1/100 of all time on a particular station or a group. of stations, the proper blowup multiplier would be 100.

Next, ASCAP must also use economic multipliers which [fol. 379] are supposed to reflect the revenues from various

groups of licensees.

Lastly, ASCAP is required to try to get logs of local stations in order to reduce identification problems, particularly from foreign language stations, good music stations and background music stations. That means Muzak and others in that field. And I understand that as to Muzak and the others in that field ASCAP is by contract arranging to get logs.

The Court: I think that was part of the royalty fee that I fixed, wasn't that, Mr. Finkelstein, that they were

to give you logs?

Mr. Finkelstein: Yes, your Honor, right in that contract.

The Court: All right.

Mr. O'Donnell: Of course these logs will not only be

useful in reducing non-identification problems but they will also help to check the accuracy of the tape service.

After various consultations the Government was told by expert personnel at the Bureau of the Census that this proposed judgment correctly directs the kind of survey that should be made and that the new ASCAP survey [fol. 380] plan appears to be in accordance with accepted principles of this new science. However, they insist on the reservation that the performance of a complicated survey cannot be guaranteed in advance and must be observed after it has gone into operation to insure that its data is being properly processed. This surprised us as much as it probably surprises the Court.

The Court: No, it does not surprise me. I don't regard it as a science. It is subject to human error and trial and error, and that is the way you correct it. You try something out and you modify it when you see it does not work.

It is not exact. Therefore it is not a science.

Mr. O'Donnell: No, we don't intend that it is exact. We intend that it be very close.

The Court: I have studied this part very carefully and it impresses me as being a sensible idea at least to try out and see how it works.

What about this review business where you say that a survey is to be reviewed periodically or periodically reviewed by an independent expert to be appointed by the [fol. 381] Court? What did you have in mind in that connection?

Mr. O'Donnell: That, too, is a result of advice we re-

ceived from the census experts.

The Court: What did you mean when you said: An independent expert to be appointed by the Court! Did you have in mind that the Court should appoint another expert in this field to have him check up on the work of the expert who has been employed, one expert checking up on another expert! Or did you have in mind that the Court should appoint some practical, fairminded business man with a little-business acumen and common sense to see how this thing works out?

Mr. O'Donnell: No, I don't think that would work. I think the man who has to be appointed must have a very

superior mathematical education.

The Court: I can't see appointing an expert to check the work of another expert. That is something that I cannot grasp. I would rather see some competent business men, perhaps two-business men, men with business judgment—not necessarily business men, but perhaps one with some legal training and one without legal training—sit down and look over this thing every couple of months to [fol. 382] see what they think about it rather than have another expert in the same field.

Mr. O Donnell: I suggest that the mere business men would not be able to make the very complicated computations mathematically that are necessary to see whether.

this survey is coming in accurately or not.

The Court: Well, he would have a pretty fair sense of business judgment. Then, if he needed any mathematical calculations, he could have them made the same as a business man calls in an accountant at the end of a month if he feels business isn't going right: Give me a profit and loss statement. How many have we sold of this item, and how much did it cost us to produce. Business sense, maybe, and a little judgment. I can't grasp appointing an expert to approve or pass upon the work of another expert.

Mr. O'Donnell: The first expert has merely designed the survey. He is not going to remain as a continuing supervisor of the survey. The survey is going to be carried out very largely by ASCAP personnel, and it is that, I suppose; which provides the needs for an independent [fol. 382] expert to check on what is going on. I think that happens throughout the whole business world. When a business man wants something done which is at all scientific he just calls in an expert.

It seems to me very much like-

The Court: But we have already called in one expert.

Now we are going to call in another expert?

Mr. O'Donnell: You have called in one expert who has devised a plan, but he is not going to remain there continually supervising the outcome of his plan.

The Court: Then how do we know this plan has been

carried out?

Mr. O'Donnell: That is why we need the new expert, to see that it will be carried out.

The Court: No, I contemplate that ASCAP not only would have this man of Joel Dean Associates set up this scheme or survey system but that they would bring him in every month or so and let him see how it is working.

It is like going to consult a specialist as to your ailment. He tells you: Here, now, take these pills and come back [fol. 384] and see me in two or three weeks.

Mr. O'Donnell: Yes, sir, I think your. Honor has hit

upon a perfect example.

The Court: I think this Dean Associates should be on some kind of a regular retainer to keep watch to see that the treatment they prescribed is being carried out. Then I think that this contemplated that the Court would appoint one or two men to sit down and look this thing over maybe quarterly; and, very frankly, as I read this over the weekend, I became more convinced that that course should be followed and I determined in my own mind who might be appropriate, and I have in mind, very frankly, men of practical business judgment like former Senator Ives, and a man with some legal training like former Supreme Court Judge McGeehan.

I don't know whether they will take the job if I offered it to them or if the opportunity comes for me to consult with them, but I think men of that type who have public confidence in them, who have been found to be honest, decent men of good business judgment and legal training, who have reached the stage where they are above any [fol. 385] possible political contacts, would be the type of

men that I would have in mind.

However, we will come to that later on. I have not mentioned this to either one of these men. I don't know whether they would even undertake the work. But that is what I would have in mind.

Mr. O'Donnell: Of course we were told by the people of the Bureau of the Census that a sampling design expert-

was necessary.

The Court. They can get somebody to look at this and then pass their own judgment on it. These men are men of business judgment, men who have been accustomed to pass on these or similar things of this nature in their long careers, men who have fulfilled years of public service and who have public confidence in them which they have earned

by the way they carried out their work, and I for years have had great respect and admiration for the judgment of both of these men.

As I say, I don't know if they would even take this position if I called them up. They might tell me "Thanks" and then "No." But men of that type are men that I have in mind.

Mr. O'Donnell: I think we approached it much like a [fol. 386] patient goes to his doctor. If the doctor says take six black tablets every day—

The Court: All right. Let me see.

Is anybody objecting to this survey part of the decree? Mr. Horsky: Yes, sir. I would have considerable to say about that.

The Court: Mr. Horsky is objecting to that. Mr. Schaeffer: Mr. Schaeffer objects to that.

Mr. Rothstein: So does Mr. Rothstein.

The Court: Anybody else! Mr. Battle: I object to that.

Mr. Fishbein: I object to that although my brief is limited to Section IV.

Mr. Zissu: I object to the survey, but I have not included that in the brief except collaterally.

The Court: Mr. Battle, you are objecting, too?

Mr. Battle: Yes, sir.

Mr. Barney Young: Barney Young, also.

The Court: Barney seems to be an added starter.

[fol. 387] Are you Mr. Young?

Mr. Young: Yes, your Honor. I am represented by Mr. Rothstein.

The Court: Then you let Mr. Rothstein speak for you. You have a very able lawyer.

Mr. Young: I want to speak for myself personally so far as I am concerned as a songwriter. He is representing two firms with which I am connected.

The Court: You didn't make an application to be heard before, and Mr. Rothstein said that he represented some clients. I think he mentioned you as one of them, and I suggest that you let Mr. Rothstein speak in your behalf.

Mr. Young: I think there was a misunderstanding so far as—

[fol. 388] The Court: Supposing you straightened it out with your counsel. All I can assure you of is that in the past Mr. Rothstein has given very substantial evidence as to his ability, his industry, and I regard him as a very capable lawyer in this field of law.

Mr. Young: I believe he is very capable. That is why I have retained him. But, your Honor, does that preclude

me from later speaking?

The Court: Yes, it does. I am not going to hear a client and his lawyer, both.

You didn't speak or ask to be heard before, did you, sir!

Mr. Davis: Bob Davis.

The Court: What is your interest in this thing?

Mr. Davis: I happen to be a member of the Society, sir, and when he mentioned a survey I feel that there is some slight discrepancy that—

The Court: You speak to Mr. Battle or let him speak in your behalf. He is a songwriter, too, and he will voice your objections on your behalf, too, later on. All right?

Mr. Davis: I don't think he can understand what is in my

mind. But, if you say so-

The Court: I am sure you can tell him what is in your [fol. 389] mind.

Mr. Kaufman: I would like to be heard on that, too.

The Court: All right, Mr. Kaufman.

Mr. O'Donnell: May I pass now to Section IV which is the fairly controversial section?

The Court: Section IV has to do with distribution to publishers?

Mr. O'Donnell: Weighted voting.

The Court: All right.

Mr. O'Donnell: The 1950 judgment required that the board of directors be elected bi-annually by vote of all members but that due weight might be given to a member's classification in determining how many votes he might cast. It also required that the board give representation as far as practicable to members with different participations in ASCAP's revenue.

I call your attention to the fact that that was fairly loose language because "as far as practicable" might mean some or much or maybe none at all.

ASCAP tried to carry this into effect by requiring the nominating committees to propose candidates for the board with different participations. Moreover, the nominating committees themselves were generally comprised of rather [fol. 390] small members. The rub was that, though frequently nominated, these candidates with small participations were very seldom elected. That is because the members of the old board automatically stand for reelection, and except for three instances since 1950 they have always won.

We believe that the present allocation of voting strength concentrates far too much power in the top writers and publishers. At the present time 99 per cent of the publisher members taken together do not have enough combined strength to elect a single director. The same could be said of 95 per cent of the writer members.

In these circumstances the casting of a vote by a small member is a fairly hollow gesture, and this is all the more serious because the board of directors controls the whole

ASCAP operation.

We have never questioned the principle that a great writer like Irving Berlin deserves much more of a voice in the Society than an unknown writer who has perhaps written only a single piece of music. That principle was expressly acknowledged both in the 1941 judgment and in the 1950 judgment.

What we do say, however, is that the present ASCAP [fol. 391] rules go too far in recognizing top writers and top publishers. We think they obviously deserve a lot of recognition but not as much as they have been getting.

The present system is one writer vote for each \$20 of income and one publisher vote for each \$500 of income.

The new plan contemplates weighting votes on the basis of current performance credits during the latest fiscal year. We think of that as a fairer basis because income includes seniority and past performance factors, and voting rights that are tied to income obviously favor the older members.

The new judgment also sets a ceiling of 100 votes beyond which no member can climb. The significance of that ceiling can be put into perspective if we recall that in the 1957 election the member with the greatest number of votes had

5,117 votes. The new judgment also uses a graduated scale of the performance credits that are needed for each additional vote in order to make it harder for the larger members to accumulate voting rights up to 100.

If we look at the 12 publishers and their affiliates [fol. 392] who are now on the board of directors they show today a combined voting strength of 56 per cent, and if the new judgment is signed they will be reduced to 30 per cent.

There is also a provision allowing any group of writers or publishers representing 1/12 of the total vote to band together 90 days in advance of an election and elect a director by petition if they desire to do so. 1/12 of the publishers total would be 409. There are 628 publishers who have only one vote each. That means that about two-thirds of them, if they wanted to, could get together and elect a director who would presumably be specially sensitive to the interests of one vote members.

The Court: Sort of proportional representation?

Mr. O'Donnell: Yes.

The Court: In your new plan do you provide for cumulative voting?

Mr. O'Donnell: No, your Honor. If you cast a vote by

petition, you are then ineligible to cast a vote—
The Court: Apparently you do not get my point.

[fol. 393] Mr. O'Donnell: There is no cumulative voting involved here. Each member votes for all directors. He is not allowed to combine them.

The Court: So there is no cumulative voting.

Mr. O'Donnell: No, your Honor. The new judgment takes especial, precaution with respect to the top ten publishers and their affiliates. This group now controls 63 per cent of the publishing vote, and if the new judgment is signed they will be cut back to 37 per cent.

The judgment goes further and in effect provides that, if these top men should grow any further in the future, the formula will have to be revised to hold their voting strength within 10 per cent of the strength at which they start off on the day the judgment is entered. So there are no conceivable future circumstances under which these top ten publishers could possibly grow to more than 41 per

cent control of the Society. They will begin at 37 per cent control.

I think it is interesting to note that these ten publishers actually have two-thirds of the performances of the Society [fol. 394] and we are going only to give them 37 per cent or one-third of the votes. That means inversely that all the rest of the publishers have only one-third of the performances but they are going to get two-thirds of the votes.

There is another provision for (D) which permits any group of 25 writers or publishers to place candidates in nomination for directorships. This is a happy contrast, we think, from the present system under which the directors automatically stand for reelection and also elect the committees which nominate others to run against them.

I would suppose that all the friends of the Court who are here today would agree that this new judgment has taken very substantial strides in the direction of diminishing concentration of control. Some of them of course may ask:

Why didn't we go further, or why didn't we demand one vote for each member?

The first answer is that all these concessions which are in the judgment were very hard won at the negotiation table, and we were convinced that we have reached the absolutely outermost limits to which ASCAP could be persuaded to retreat by negotiation. Moreover, as our nego-[fol. 395] tiations went on we gradually came to believe that it wouldn't be appropriate or fair to go any further.

We think that there is very much substance to ASCAP's argument that those who over the years have done the most for ASCAP are entitled to be recognized as its elder statesman. This is not a society in which every member pays large fees, large dues. Actually the only real dues are however much or little each member adds to the catalog of the Society.

When ASCAP goes around selling its catalog, most music users are attracted primarily because it contains the works of Hammerstein and Berlin and Kern and Gershwin and its other great writers, and they have a very much lesser interest in the circumstances that it also contains a large number of more or less unknown pieces of music by more or less unknown writers.

If the Court were to give every member an equal vote we think that would deliver the control of ASCAP into the hands of hundreds or thousands of very small members, many of whom I have heard characterized as amateur songwriters.

The Court: Sometimes an amateur turns out something

[fol. 396] that hits the bull's eye, though.

Mr. O'Donnell: Yes, that happens, and I certainly don't mean to deride them. I mean that they are amateurs only in the sense that they perhaps have had only one or two songs published and they may be practicing architecture or dentistry or something else as their main livelihood.

But if we did that we would have another set of statistics which would be just as disturbing as those that disturb us today. They would show then that ASCAP was being dominated by members who had perhaps 2 per cent of all

the performances of the Society.

Which is worse? Shall we have ASCAP run by a numerical majority with only a tiny fraction of the performances, or shall we have it run by a numerical minority who has a

vast majority of the performances?

Of course there wouldn't be any problem at all if every publisher and every member had the same number of sense and if all songs were of equal quality. But we cannot make that come to pass. So we have to strike a balance which is [fol. 397] what we think the new judgment does.

It has also been represented to us that many or most of the top writers and publishers would walk out of ASCAP if we should succeed in inducing this Court, after litigation, to cut any further into their influence. We could insist, of course, that there must be numerical equality of voting rights even though the heavens fall. But we fear that the heavens would fall, and if that happened the rest of the members of ASCAP, who I think include most of the friends of the Court who are here today, would, find that their incomes would be very precipitously reduced.

The catalog of ASCAP minus the music of its name writers could not be sold for anything like the revenues which it is bringing in now. I would think that if that happened, if a large number of the top members did walk out of ASCAP, the survival of the Society itself would be in doubt.

So we ultimately came to the conclusion that a prayer for equalizing of voting rights would be equivalent of a prayer for dissolution.

One final point. It has ever been said that there is more [fol. 398] than one way of skinning a cat. If the new judgment goes into effect all these charges about a board of directors which is bent on ruining small members are going to fade in importance. The new judgment circumscribes very sharply what the board may do in the area of surveys, distributions and grievance procedures with the result that its power to do the kind of harm that offends the antitrust laws is going to be very much curtailed if not eliminated.

The Court: I have a note here on this section:

Would it provide for the election of directors within one year or after the effective date of the proposed final judgment?

Mr. O'Donnell: Yes, it would.

The Court: You say probably early in 1961?

Mr. O'Donnell: Yes,

The Court: Why couldn't it be earlier than that? Why couldn't it be in 1960?

Mr. O'Donnell: This judgment is timed, it appears, just after an election. There has just been an election.

The Court: If they are going to vote on this, they might [fol. 399] as well vote on a change that would be effective not a year and half from now but make the change effective some six months from now.

Mr. O'Donnell: I was going to make the point first-

The Court? You see, if you say early 1961, that is another year. Early 1961 may be April. That is another 18 months. Why not have this election and let these new voices be heard within, say, six months? Wouldn't that tend to promote harmony?

Mr. O'Donnell; I have only two thoughts on that, your Honor. First, this judgment is untimely in the sense that it comes into being, if it comes into being, almost immediately after an election.

The Court: That means nothing.

Mr. O'Donnell: My second provision is this one about election by petition 90 days in advance of the election. I

suppose, if anyone is going to take advantage of that, they

will have to be some kind of campaign manager.

The Court: Suppose we ask Mr. Dean to comment on whether or not this election could be held at an earlier date; [fol. 400] when your time comes, Mr. Dean, if you will just make a note of that to speak on that subject.

Mr. Dean: I will be glad to do so, your Honor.

The Court: I would like to hear you on that. My idea is that it seems a little long to keep this thing waiting until the early part of 1961. Maybe you could put this into effect in the summer or in September of 1961, at the latest.

Suppose now we take a ten-minute recess.

(Recess taken.)

Mr. O'Donnell: I would just like to finish the thought which I thought I had begun:

That if any sort of a self-appointed campaign manager is going to run around trying to line up 1/12 of the votes in order to elect a director by petition. I suppose it is going to take him two or three months to do that. Then he has to get them lined up.

The Court: I have seen campaigns run in a much shorter

time.

Mr. O'Donnell: Let's say it takes two weeks to do it, then.

[fol. 401] The Court: I just throw that out as a suggestion. As I read this over the weekend I thought it was postponing the election under the new decree, assuming that I approve it, for too long a time. I would like to see it get into operation as quickly as feasible to do so.

Mr. O'Donnell: My point simply is that the petition-

The Court: I don't say that by way of criticism. I think that you tried to work out something on this provision, that you have given it your best efforts, I know that, as you have to all of these provisions, but sometimes a new mind on these things might lead to a change of view on your part, and it seemed to me that as soon as you can get this decree into operation, assuming I sign it, the better it will be.

Mr. O'Donnell: That is possible.

The Court: Mr. Dean is going to comment on that, I hope, and we will see what he has to say. He may agree with me; I don't know.

Mr. O'Donnell: At least we couldn't have an election for 90 days plus whatever time it takes to line up 1/12 of the voters:

The Court: 90 days more, six months. [fol. 402]

Mr. O'Donnell: That is about all I have to say, your Honor.

The Court: Your associate is going to speak about what portions?

Mr. O'Donnell: I would ask you to listen to Mr. Bennett

on Sections III, V and VI.

The Court: That concerns the distribution of the moneys.

Mr. O'Donnell: III is distribution.

The Court: And I suppose that is what everybody is interested in. III is distribution. V is what, just to refresh my recollection?

STATEMENT BY MR. BENNETT

Mr. Bennett: V, your Honor, has to do with the method of taking appeals.

The Court: All right.

Mr. Bennett: And VI has to do with insuring that the right to admit new members is properly carried out.

The Court: All right. Suppose you stand over there, Mr. Bennett, and take your time now and speak so that everybody can hear what you have to say.

Mr. Bennett: Yes, your Honor.

The Court: Very frankly, I want to turn this [fol. 403] into what is known up in the Northeast here as a sort of a town meeting with me being the town boss. I would like to hear all your views, and I want you to participate in this because I think that by doing that we can create a better understanding and we can get a spirit of cooperation which is most desirable if it can possibly be achieved.

Mr. Bennett: If your Honor please, may I turn first to the question of the distribution of funds which are collected as license fees by the Association. You have heard Mr. O'Donnell in connection with the surveys, how they defermine what performances there are. Now we are turning to how those funds which are collected are distributed

among the members of ASCAP.

This has naturally been a very sensitive point as it affects the cash returns to the members, and since the entry of the original decree in 1941 it has been a source of dissension.

At the outset, if I may, I would like to draw to your attention a few other reasons for the inclusion of provisions which affect what on the surface appear to be the purely [fol. 404] internal affairs of this Association. The reason flows in the first instance from the ancient principles of equity which had moved the Chancelor, once he takes jurisdiction of the matter, to see that complete justice is done

to all the parties.

The Department in this proceeding which commenced in 1941 sought relief from what were regarded as monopolistic practices of this Association which at that time controlled a great mass of the copyrighted musical property in the United States, and in regulating the Association the defendant felt that it must, and it recommended to the Court with the consent of the Association, not only regulate the Association's activities with respect to those whom the Association was licensing but also insure that the distribution of the funds which were collected under those licenses be fair and equitable, and the Department also felt that both of these ends were appropriate to prevent a restraint of competition.

The regulation of the Association's activities with outsiders of course is clear. The Court, once having taken jurisdiction, we felt it would be appropriately advised to [fol. 405] see to it that the distribution of the funds to the persons who were joined in this Association should be used in a manner not to subsidize one writer and to starve another. For although these men, particularly the writers, are great artists, they also compete with one another for the funds which they require physically to support their

endeavors.

May I continue now with the history. The first decree of 1941 in paragraph X laid down very general rules for the Association prescribing the method to be followed by the governing board in making distribution. It required the bylaws of the Association to prevent distribution except in a fair and non-discriminatory manner and on the basis of,

first, the number, nature, character and prestige of the compositions, secondly the length of time the compositions had been available to the Society, and third the popularity and vogue of these songs.

These criteria granted to the Association considerable latitude both in classifying the writers and the songs. Thus

an opportunity for favoritism existed.

[fol. 406] After ten years of experience the Court, again with the consent of ASCAP, sought to prescribe a more objective test at the request of the Government. This time Section XI, to which Mr. O'Donnell has already referred, provided that in general the performance of the work should be the guiding principle in making distribution. The phrase used was "primary consideration," and I need not belabor the point that when you have a word like "primary" it is difficult to find a contempt.

Experience since 1951 has demonstrated that again the provisions of the decree as amended in 1950 were too general in the matter of distribution. Hence in this decree we sought greater particularization, and after protracted

negotiation this proposed judgment was obtained.

Very generally so far as distribution is concerned the Department presents the proposed decree as a compromise, a compromise which we believe will permit distribution on a much more objective basis than was the case before.

We do not contend that it accomplishes perfection, but we submit that it is the best result that could be ac-[fol. 407] complished without very lengthy and very difficult

litigation with very uncertain results.

As such we submit this proposed judgment to the Court as a practical solution to a distribution problem which includes many factors which cannot be measured with tools other than the judgment of the persons who are experienced in the musical field.

The Department has canvassed this field and where possible has incorporated the judgment in the various formulas which are present in the proposed decree. In most instances this has reduced the judgment factor in the mechanics of distribution to a degree which first seemed impossible.

The Court: Let me ask you a question, if you do not mind an interruption.

Mr. Bennett: Yes, sir. I would like you to, if you would,

your Honor.

The Court: At the present time I understand that all of the royalties and all the revenue of the Society is put in one general fund and then what remains after the operation expenses is divided and 50 per cent of that goes to the writer [fol. 408] members—

Mr. Bennett: Yes, your Honor.

The Court: And 50 per cent goes to the publisher members.

Mr. Bennett: That is correct.

The Court: Is it contemplated by the proposed amended consent decree to change that basic provision.

Mr. Bennett: No, sir, it is not.

The Court: It will still be 50 per cent of the publishers and 50 per cent to the writers?

Mr. Bennett: That is as I understand it.

The Court: Now then, your changes affect the manner in which that 50 per cent shall be divided amongst the publishers and the manner and method in which it shall be divided among the writers.

Mr. Bennett: Yes, sir, your Honor, precisely.

The Court: All right.

Mr. Bennett: I thought I might draw to your attention-

The Court: May I just ask those who have asked to appear here, does anybody object to this basic division of 50 per cent to the writers and 50 per cent to the publishers! [fol. 409] Apparently then that is accepted as a fair basic

division. All right.

Mr. Bennett: Now, your Honor, may I turn to tell you just how this reduction of the judgment factor which I talked about was reduced to a formula. I first would like to draw your attention, and I am sure your Honor remembers it, to the fact that the provisions setting forth this distribution plan are found in four separate places in the document to which was handed to your Honor and which was circulated to all the members.

The Court: Incidentally, I don't have the document divided in the very nice manner in which yours is.

Mr. Bennett: Your Honor, may I give you mine.

The Court: I don't want to take it from you, but it would be very helpful if I had one like the one you have. This is very nice. This has all the divisions in it and it will be most convenient. Not only do I have it now, but any of you gentlemen who want to look at it during the recess might look at it.

[fol. 410] All right. You don't mind my taking these from you?

Mr. Bennett: Not a bit, sir.

Section III in the body of the decree, which is the last of the ones with blue divisions there, your Honor, has a tab that says "Distribution" on it, I believe.

The Court: You assume now that I can navigate my way

through this book.

Mr. Benneh: I will assume that you can, sir.

The Courf: All right. I have come to it.

Mr. Bennett: The general terms are in Section III, and attachments (A) and (B) supply the rules respectively for the writers and the publishers.

Attachment (B) relating to the writers also refers to a writer's distribution formula which is not part of the decree but which is a proposal which ASCAP has made of the manner in which they believe the distribution will take place and which the Government has indicated they believe will be in accordance with the provisions of the judgment.

Then there is a third attachment which is part of the [fol. 411] judgment which is called the weighting rules. That is attachment (C), and that supplies the rules for weighting the significance of particular uses for musical compositions as a light term of the significance of particular uses for musical compositions as a light term of the significance of particular uses for musical compositions as a light term of the significance of particular uses for musical compositions as a light term of the significance of particular uses for musical compositions as a light term of the significance of particular uses for musical compositions as a light term of the significance of particular uses for musical compositions as a light term of the significance of particular uses for musical compositions.

compositions and determining their relative values.

Finally, just as there has been a writer's distribution formula, there has been a weighting formula. This is not part of the decree; it is the proposal by ASCAP, which the Government thinks is in accordance with the decree, of how the weighting rule shall be applied. The weighting formula indicates in considerable detail how it is to be applied.

I would like to draw your attention first to the concept of the distribution plan. That is the main concept that, unless other factors require some different approach in the interest of fairness, performance of the musical work will be the basis for the distribution of the funds both to the writers and toothe publishers, considered separately as

your Honor has indicated.

We believe we have developed something which is very advantageous in this particular decree to insure that the principle of performance would be the dominant criterion. [fol. 412] Individuals, both publishers and writers, with two classes of exceptions are given the right to elect to receive distribution on the basis of performance. Thus anyone who is dissatisfied with the more complicated plan which is proposed by the Association could elect to receive distribution on the current performance basis.

The first exception—I have mentioned two—is the 100 top writers whose works have been so overwhelmingly popular that the Association felt, subject to the collective approval of those writers, they should be treated differently. This collective approval can be reviewed on request of the Government or on a request of a group of writers after it has been tried out for a three-year period.

The second exception to the rule is that the publisher companies are prevented from obtaining current performance immediately. Some of those companies were marketed on the basis, as we understand it, of the Association's previous method of distribution, and it was felt that to permit them to elect full payment on a current performance basis would disrupt the matter. So a sug-[fol. 413] gestion has been made that a current performance basis as far as publishers are concerned would be deferred on a sliding scale so that it would be 75 per cent the first year and 100 per cent at the end of the period of five years.

Your Honor, I have used the term "current performance," and I would like to describe just what that is. Current performance, and in fact all performance, gives effect to three principal factors. The first is the nature of the use; that is, whether it is a use as a featured song or as an auxiliary use such as a background use. The second is the character of the musical work itself. The third is the

place where the performance takes place.

The details of the first two, that is, whether it is an auxiliary use and the character of the work itself, are found in the weighting rules, attachment (C), and the

weighting formula which has been handed up with the judgment. The third you have already heard comes from the Survey provisions. That is, they are economic multipliers and survey multipliers which give effect to the place where the performance takes place.

[fol. 414] The currency which is used to determine the amount of money which an ASCAP member is to secure is called the performance credit. In a typical case a man or a woman or a child sings a song on the radio or on television. This is called a feature performance, and under the normal course it gives rise to a single credit.

Exceptions include repeat performances on a single proogram, so that where more than eight performances are given in a single quarter of an hour or programming or radio or television there would be a decrease, and in those instances the use credit is reduced so that there is a maximum of one and each use beyond one secures 10 per cent. So that where more than eight are performed in a quarter of an hour there would be a pro rata reduction.

Second, copyrighted arrangements of works which would otherwise be in the public domain secure 10 per cent of the otherwise available credit unless they are part of a portfolio in which they secure only 10 per cent. There, however, are specific situations in which these arrangements creceive a higher percentage. If the lyrics are entirely new [fol. 415] and only the title is the same and the melody, they receive 35 per cent of a use credit. If both the title

and the lyrics are new, they receive 50 per cent.

Now, your Honor, I want to draw attention to this exception because it is one in which unusually in this decree there is some discretion. Copyrighted arrangements which have been substantially new melodic material as well as lyrics and title will receive 75 to 100 per cent determined by the special classification committee for public domain arrangements.

This same committee would determine within limits of 10 per cent to 100 per cent the value of arrangements of copyrighted material of four minutes or more in length, that is, serious works.

Along the same line, your Honor, extra credit is giving to a feature performance of a choral, symphonic or similar concert performance when it has more than four minutes time. This extra credit is on an increasing scale so that, for example, if there is an hour performance of a single work such as a symphony that would receive 76 credits rather than one use credit. There is a special credit also [fol. 416] for performances in concerts in symphony halls where there is five times the credit given of the actual fees which are obtained from the symphony hall. And cultural symphonic orchestral programs on sustaining programs of a national network are awarded credit equal to performances on a radio network of 50 stations.

The next portion of the judgment relates to the different types of uses. Songs are utilized in other ways than in feature performances, as your Honor realizes. These other ways include the use of compositions as themes, background music, jingles, one or bridge music, and they are described in detail and defined in both the weighting rules and the weighting formula. They are given credit principally in accordance with two factors. The first factor is the type of use, and the second factor is the inherent value of the music itself.

Every effort has been made in this area to reduce to a formula, to a mathematical certainty, the amount of credit which will be given, and let me explain. In a theme song, which is one of the five types of use of music which is subject to a reduction in value, the weighting rules permit [fol. 417] a distinction between compositions of not to exceed 10 to 1 depending upon the character or the reputation, one might say, of the musical work. This reputation of a particular work is determined by the number of feature performance credits which that musical composition has secured.

The tests to qualify for extra credit are of two kinds. First, the work must be well known, and the criterion has been 2000 feature performances since 1943. Also, there must be continued interest in the work with credits for the five latest available years amounting to 2500 of which no more than 750 will be counted for a single year.

A musical composition which meets these two tests is described as a qualified work and it receives a full use credit for all theme musical performances within an hour and a tenth of a credit for all additional performances if

the program goes to a two hour period.

A work which does not have this reputation and, therefore, is described as non-qualified receives only 10 per cent of the use credit for all performances within the first 60 [fol. 418] minutes and 1 per cent for all of those in addition after the first hour.

If a song is performed as a theme or as a signature sing and also as a background music or as a feature, the aggregate percentage which that song can obtain is limited to one and one-tenth credits for the first hour and onetenth for the second hour.

There is also a special rule where two or more works are performed as part of a signature or a theme song, the sharing to be proportional to the percentage which each would otherwise have been entitled to receive.

Problems arose in determining the number of use credits which have accumulated since January, 1943 because ASCAP records do not differentiate between features and non-features before 1955. After 1943 there are records, but they only tabulate uses of any type. Before that ASCAP had no records. I draw that to your attention, for that is the reason why the dates are set as they are.

The rules provide for a presumption that there have been 20,000 feature performances if the work was listed in one fol. 419) of four different ways. If it was in Prentice-Hall's Variety Music Cavalcade of 1952, the Lucky Strike Hit Parade or one of the ten top songs published in Variety or Billboard, the rules provide that there will be a presump-

tion that it had 20,000 feature performances.

Where the work has not been performed this number of times it yet may get a higher percentage of a use credit than an unqualified work, that is, an unknown one, if it accumulates 15,000, 10,000 or 5,000 feature credits, provided it has also been popular within the last five years to the extent of showing 2500 feature performances of which no more than 750 were counted in a year.

The Court: Let me interrupt, if you don't mind.

Mr. Bennett: No, sir. I hope you will.

The Court: We have already seen that the money collected by ASCAP, the net result; has been divided into two funds.

Mr. Bennett: Yes, your Honor.

The Court: The publishers fund and the writers fund. At present the writers fund has divided into four separate funds.

[fol. 420] Mr. Bennett: Yes, your Honor.

The Court: The Current Performance Fund, the Sustained Performance Fund, the Availability Fund and the Accumulated Earnings Fund.

Mr. Bennett: Yes, your Honor...

The Court: Is it contemplated by the proposed amended

decree to change that division into four funds?

Mr. Bennett: Yes, your Honor. It is contemplated that the writer at his own election may say "I want all my credits not on a fund at all but on the basis that my performances or that my work, rather, bears to all the performances that have been received."

The Court: That is, a writer may be given or will be given the occurrence performance option.

Mr. Bennett: That is correct, your Honor.

The Court: Assuming he does not exercise that option, would the four divisions or four funds still remain?

Mr. Bennett: There are four divisions, but they are different from the way they were before.

[fol. 421] The Court: You have changed them?

Mr. Bennett: Yes.

The Court: In what respect have you changed them?

Mr. Bennett: I wonder if it would help your Honor if

I handed up a chart.

The Court: Tell the folks who are here. For instance, put aside now the option. We have now a current performance fund into which 20 per cent of the 50 per cent goes.

Mr. Bennett: Right.

The Court: A Sustained Performance Fund into which 30 per cent of the 50 per cent goes.

Mr. Bennett: Right.

The Court: The Availability Fund into which 30 per cent of the 50 per cent goes, and the Accumulated Earnings Fund into which 20 per cent of the 50 per cent of the writers fund goes. Are you still going to have those four funds?

Mr. Bennett: We are going to still have four pots, using a poker analogy.

The Court: I don't play poker. That is a luxury I can never afford.

Mr. Bennett: Let's call them bins, your Honor. [fol. 422] One of the bins that is going to amount to 20 per cent is the same. That is the Current Performance bin, and that is 20 per cent.

The Court: There is no change in that percentage?

Mr. Bennett: No, sir. The Court: All right.

Mr. Bennett: Except, of course, your Honor, in that what a current performance is has to be to some extent changed.

The Court: No. I want to find out what changes have been made in the allocation, the overall allocation, to these funds..

Mr. Bennett: Yes, your Honor. It is still 20 per cent, and it is still per cent on membership continuity which is the seniority fund, which is the fourth of the funds which you mentioned.

The Court: The Accumulated Earnings Fund is 20 per cent. The other is the Current Performance Fund, 20 per

Mr. Bennett: The Accumulated Earnings Fund was also based in part on the fact that a member had belonged for a period of years. This membership continuity fund is [fol. 423] also based on that theory.

The Court: You are not going to change the amount

allocated to that fund?

Mr. Bennett: No, sir. That is going to be 20 per cent,

and so is the current performance.

The Court: What have you done to the Sustained Performance Fund which was 30 per cent and the Availability Fund?

Mr. Bennett: We have changed that, your Honor. We said it is going to be an average performance of 30 per cent, and that is based on a five-year average instead of an election to have a ten-year average which was present before, and we have also changed the brakes. You will remember that under the old funds a man could for a period of a number of years, because his average had dropped, still have the peaks and valleys of performance straightened

out a little bit by a brake which was put on it so that he only got a percentage of the drop. We have changed that to an extent.

The Court: What have you done to the Availability

Fund, 30 per cent?

Mr. Bennett: The Availability Fund, your Honor, is not [fol. 424] called that at all any more, but there is a 30 per cent fund which is determined by the five-year average performance of recognized works. Recognized works are works which have been published and are played once and then thereafter, after four quarters. That is, there has been a situation where a work has been published and at least a year afterwards it is still published again. That is a recognized work.

The Court: Let's come to the publishers' 50 per cent.

Mr. Bennett: Yes, your Honor.

The Court: Presently you have that divided into three funds, not four.

Mr. Bennett: Yes, your Honor.

The Court: The Current Performance Fund in which you give 55 per cent of the 50, the Availability Fund in which you have been giving 30 per cent of the 50, and the Seniority Fund, 15 per cent of the 50.

Mr. Bennett: Right.

The Court: Is it contemplated to keep those three funds?

Mr. Bennett: It is contemplated to keep three funds, [fol. 425] your Honor, but they are changed and one of them is going to disappear.

The Court: What one is going to disappear?

Mr. Bennett: The Membership Continuity Fund which is the one which is based on the fact that a publisher has been a member of the Society for a period of years. At present it is 15 per cent and by 1964 it is going to decrease to zero.

The Court: So that you are working out that so-called

Seniority Fund.

Mr. Bennett: As far as the publisher is concerned, not

as far as the writer is concerned.

The Court: So that after five years you will have only two funds of the publisher's moneys.

Mr. Bennett: That's right. One will be the Current Performances Fund, now 55 per cent, which eventually will be 70 per cent, and that is going to be by 1964.

It is called recognized works now, your Honor, and it

depends on the same factor that we had before.

The Court: All right. You have some charts.

[fol. 426] Mr. Bennett: Yes, which I believe describes

this. It is pretty rough.

The Court: Rough or not rough, you went to some trouble to prepare those charts. Take that colored chart and stand up there.

Mr. Bennett: May I give you a copy of it?

The Court: All right. Stand up there, and you just point out what you are talking about.

Mr. Bennett: Your Honor, does your Honor want to

see this as well?

The Court: I have it here before me.

Mr. Bennett: I think it is going to be a little difficult to see this at that distance.

The Court: You have copies available?

Mr. Bennett: I have about six copies available, your . Honor.

The Court: During the luncheon recess, if anybody wants to look at it, they may see this graphic representation, and you may use it if you want to when the time comes when you speak as a friend of the Court. You describe what you have there and what that is supposed to represent.

Mr. Bennett: Up in red in this corner is an indication of [fol. 427] where the performance credits, which are the currency under which you secure a distribution are

described.

In the first place, you are going to get an evaluated random survey from this survey of performances, and then they are going to be divided into feature performances, themes, background, jingles, cues and bridges; and the amount which the themes, the background, the jingles, the cues and the bridges are going to receive is based on he number of feature performances. So that I've got a ittle wheel here which indicates that that is the control of he amount that flows on themes, on background, on jingles and on cues and bridges.

Over at the other side where all the performance credits come down I've got another little wheel right in the middle of this chart, and that activates several other shafts which you will see down the side. First it activitates the current performances both of the writers and of the publishers and the Current Performance Fund in the event that there is not an election made and the regular formula of ASCAP pertains.

[fol. 428] The Court: Now let me ask you one question, for the benefit of those about whom-you are talking. You

are talking for me, too, I trust.

Mr. Bennett: Yes, your Honor, I am, sir.

The Court: Does this chart represent the present method of distribution or the proposed method?

Mr. Bennett: The proposed method, your Honor.

The Court: You speak now on this chart of the proposed method.

Mr. Bennett: And it should have a word in here which it doesn't have, the words "rough sketch," because there are in this chart refinements which it does not show in the chart as a whole.

Mr. Eastman: Your Honor, might I indulge you as head of the town meeting by asking a question to get some infor-

mation?

The Court: Not at this point while he is making an exposition.

Mr. Bennett: Would you like to look at this, Mr. East-

man?

[fol. 429] The Court: I want to be very informal because this is essentially a business matter and I believe in approaching it on an informal basis as much as I can. Nevertheless you are still in a court of law. You gentlemen as members of the Bar will observe that.

Go ahead now.

Mr. Bennett: Your Honor will note that the funds which come from various types of places, radio, TV, concerts and others, are put in this bin on the righthand side and that they flow down, again activated by performance credits, into two main areas, first the writers' share which is 50 per cent, and second the publishers' share.

Off the writers' share there is a little separate fund of 5 per cent which is taken off the top in which the special awards can be made primarily for those types of music which are not generally the subject of particular recognition, but they are matters which are very useful to the musical profession and things which should be recognized.

Then you will note that from that down at the bottom of the writers' share of bin I have something which is called "election," and there are two ways that the money flows [fol. 430] from there. One is down to a bin which is called "Current Performances" and the other is down into a bin which is called "Regular Performances," and from that "Regular Performances" are four smaller bins which are called "Current Performances, Average Performances, Average Performances, Average Performances of recognized works" and "Membership Contribution."

On the other side of this 50 per cent distribution is the publishers' share. There is an election likewise there of the regular formula or the current performance formula. I am pointing these out to you as I tell you about them. Under the regular formula there are the three funds or bins, the Membership Continuity Fund of 15 per cent which is going to decrease to zero by 1964, the Recognized Works Fund which is 30 per cent, and the Current Performance Fund which amounts to 55 per cent and which will increase to 70 per cent by 1964.

Does your Honor have any questions in connection with that?

The Court: I suggest, Mr. Bennett, that during the recess you leave that up there on the board some way and [fol. 431] then you leave a couple of copies around here so that anybody who wants to look at this chart—leave a couple of those photostats here—anybody who wants to examine this during recess may do so provided you don't take it with you.

Mr. Bennett: Very good, your Honor. We will leave those with the Clerk.

Your Honor, I have told you that we have tried to decrease the judgment factor here to the extent that we could by having these divisions determined by a mathematical formula. Would your Honor care to have me

describe that mathematical formula in detail, or would you prefer that we did not?

The Court: Not at this point unless somebody brings it

up later on. Then you may.

Mr. Bennett: Then let me pass over that. Suffice it to say—

The Court: Are you satisfied with this for the present, this mathematical formula that has been devised by these

experts?

Mr. Bennett: Your Honor, it has been a matter of negotiation. We think it is the best we can do, and we think it is particularly good in that it is a certain matter.

[fol. 432] The Court: Then suppose you go to the next point that you are going to talk on and save any comments you have for your answer after we have heard from the others.

Mr. Bennett: Very good, your Honor. The Court: What is the next point?

Mr. Bennett: There is a limitation which I want to draw to your Honor's attention applying to short serial dramatic programs which are presented two or three times weekly, and in that all but feature performances are given only per cent of the otherwise available credits.

The Court: Now you were going to speak about item V,

weren't you?

Mr. Bennett: Would your Honor indulge me for a moment?

The Court: Yes. Have I handicapped you by taking this? You can have this book back now. It is better for me to be handicapped than for you because I have time for deliberation.

Mr. Bennett: You were talking about VI and V. I want to finish with Section III in just one more minute.

[fol. 433] The Court: I thought you completed that.

Mr. Bennett: No, your Honor.

The Court: It is amazing the way these lawyers keep these convenient arranged books for their own use.

Mr. Bennett: There is a special limitation on the short serials that I have indicated to you, and there is also a formula which decreases the value of background uses and of the other special uses like jingles and cue and bridge music. There is, thirdly, a special method of distribution which takes place in connection with foreign as distinguished from domestic distribution.

In connection with foreign distribution, your Honor,

the method that has been used in the past—

The Court: I don't think we need spend too much time on that.

Mr. Bennett: No, your Honor.

The Court: The total revenue is about—

Mr. Bennett: Let me pass on, then. There is a special method as far as that is concerned.

The Court: You base it now upon reports from England

and Sweden?

[fol. 434] Mr. Bennett: That is correct, and it is going to be now:

If it is over \$200,000, and they have the available information, it is going to be distributed on a current performance basis just as if it were in the United States.

The Court: All right.

Mr. Bennett: But, if it is under that, they are going to have to use the best means they can because I am informed and I believe that it would be too expensive to do it in any other way with the difficulties we have of language and what-not.

With that, your Honor, may I pass to Section V now, which is the next section and which provides how the provisions of Section XIII of the 1950 judgment shall be

carried out.

It implements paragraphs (B), (C) and (D) of Section XIII of that judgment by prescribing the detailed and more specific duties with respect to the tabulation of data, the

rights of inspection and the method of appeal.

Paragraph (A) requires copies of the decree and any rules and regulations affecting rights in voting or dis-

tribution to be supplied to each member of ASCAP.

[fol. 435] Paragraph (B) ensures the maintenance of a current mailing address of all members to be available for inspection by all members who have been members for at least a year, and it leaves any member the right to have his address confidential, but it provides that the Association in that case must send the unopened mail to him.

Paragraph (C) provides that ASCAP must maintain an alphabetical list of all compositions which receive performance credits broken down to show feature performances and those of other users. These records will be kept available for inspection, and any member has a right to examining what credits have been given to his own contribution. Provided he acts in good faith, he can check the credits of other fellows, and if he has good cause he can go ahead and examine all of the records of the Association on the subject. There is a limitation that a fellow has to be a member for a single year to have this general right simply so that curiosity seekers are not going to come in and disrupt the records of the Associations

[fol. 436] Paragraph (D) compels ASCAP to establish a special board elected, as are directors, that is, in the same weighted manner that Mr. O'Donnell has described, to hear complaints affecting the distribution of the Society's

revenues.

Your Honor will recall that one of the complaints of the existing system is that 'it goes through the board of directors to a classification committee.

Complaints under the new system would be filed within nine months unless it could not have been reasonably determined from the annual statement. The procedure of the board and the right of appeal to an impartial panel of the American Arbitration Association is provided for in the judgment. There is a requirement of prompt payment after the decision is rendered, and there is also a requirement in paragraph (C) that the stenographic transcripts be made available to the members at cost.

The effects of these further provisions are to insure that the distribution shall be fairly made and that the fruits of the competition shall be fairly secured to each member. The [fol. 437] membership has been assured at the meetings at which Mr. Dean spoke that, if a member has any legitimate reason to secure ASCAP records in connection with his financial interest as a member, there will be no problem concerning it.

May I now turn to paragraph VI, unless your Honor wants to ask any questions concerning paragraph V, Sec-

tion V.

The Court: No, I have no questions at this time.

Mr. Bennett: Section VI of the proposed amendment has three paragraphs, A, B, and C. This would implement Section XV of the 1950 judgment which required ASCAP to admit to membership authors and composers who have had one work published and/or, in the case of publishers, who had been engaged in that business for at least a year. The proposed amendment seeks to insure that this will be properly carried out.

Paragraph A provides for a reconsideration of all applications for membership which have been previously denied and the retroactive admission of applicants provided they had at the time of their original application met the [fol. 438] requirements and have not granted to anyone else the right to license the public performance of their works.

Paragraph B compels ASCAP to publish in two of the recognized trade publications twice pyear a public statement of its willingness to accept members in accordance with the judgment.

Paragraph C provides that the fact that the ASCAP survey has failed to disclose a performance of an applicant's work shall not be the reason for refusing membership if he can show in other ways that he meets the requirements. It also requires ASCAP to inform an unacceptable applicant specifically how his application fails to meet the requirements of the judgment.

Your Honor, we have now described to you the provisions of the judgment in general terms, and I move, your

Honor, that it be accepted.

The Court: All right. I understand now that it is the considered judgment of the Antitrust Division of the Attorney General's office that this proposed amended decree is the best in their judgment that can today be devised and framed.

Mr. Bennett: That is my understanding, your Honor; that the alternative would be litigation on the subject. [fol. 439] The Court: And that your Department recommends it to the Court without reservation of any kind.

Mr. Bennett: That is correct, your Honor.

The Court: All right. I think at this time I have some

people coming in at ten minutes to one to see me, and I thought we would take a recess now until two o'clock.

This afternoon, then, Mr. Dean, I will hear you, and I was going to suggest that, since the Government made such a lengthy statement concerning the decree, perhaps your comments should be brief in the beginning and perhaps you should save your comments until after we have heard—I mean save them in large measure—from those who have indicated that they desire to be heard as friends of the Court.

Mr. Dean: Very well, your Honor.

The Court: If that is agreeable to you, Mr. Dean.

Mr. Dean: Yes, your Honor.

The Court: I think it might work out better.

[fol. 440] Mr. Dean: All right.

The Court: All right. Then we will come back, with the help of the Lord, at two o'clock.

(A luncheon recess was taken.)

[fol. 441]

AFTERNOON SESSION

2:05 P. M.

The Court: Gentlemen, I am sorry I kept you waiting. What did you want, sir?

Mr. Bradford: I was delayed this morning.

The Court: I saw you here.

Mr. Bradford: I know it.

The Court: Are you a member of the Bart

Mr. Bradford: No, sir.

The Court: Are you a lawyer?

Mr. Bradford: No, sir; but I want to speak, because I own four firms, as a friend of the Court.

The Court: You own what, sir?

Mr. Bradford: I own four firms. Acme Music Company, Blues Music Company, Perry Bradford, Inc., Perry Bradford Music Publishing Company.

The Court: And you want to be my friend, do you?

Mr. Bradford: That is right. I want to be your friend.

The Court: I can't refuse the hand of friendship.

The Court: I can't refuse the hand of friendship.

Mr. Bradford, you sit down there, and I will put your name on the list. If you have four music publishing firms, [fol. 442] I will hear you, sir.

Mr. Bradford: That's right, I have four of them.

The Court: Mr. Dean.

STATEMENT BY MR. DEAN

Mr. Dean: If it please the Court, it seems to me that Mr. O'Donnell and Mr. Bennett made a very fair and objective presentation of the proposed decree, and in accord with your Honor's suggestion I will not go through the proposed decree in detail as I had planned.

I might say that when I was first retained in this matter I felt somewhat like Jack Donohue did in the musical "Sonny." You may remember he comes onto the stage—

The Court: If I were to tell you that was before my time, you wouldn't accept it, but I heard about it from my father.

Mr. Dean: He comes onto the stage dressed completely in what looks like Abercrombie & Fifch jodphurs and boots, and one thing and another, and someone says to him, "Jack, you have never been on a horse."

He says, "I've got that all fixed. They are going to put me on a horse I have never been on."

That is the way I felt when I first examined this whole setup of the musical publishing field in radio and television [fol. 443] broadcasting, and the relations of ASCAP to its members and its history, because I am sure your Honor is well aware when ASCAP was first organized it was exceptionally difficult for the average songwriter or the writer of lyries, to get paid for his work. And as radio broadcasting developed, and later television broadcasting developed, it became exceedingly difficult for the average individual engaged in songwriting to take off the time to try to negotiate, or to hire lawyers to negotiate for him, or he found as an individual he was more or less helpless in dealing with the large aggregations with whom a society like ASCAP has to deal on his behalf.

Your Honor is quite familiar with the earlier litigation that came on for trial before Judge Goddard in 1935, and with the consent judgment entered in 1950.

I might say, generally, that it seemed to me, after examining the letters of complaint from the members, and after conferring with the Department of Justice, and we had some 30 or 40 conferences with them of some length, that the first thing that ASCAP ought to do was to bring in a completely independent organization with skill in its field to make a survey of television networks and radio networks and local television and local radio, and the other [fol. 144] media, on which these songs were performed to try to work out some survey that would be completely independent and as accurate as people skilled in this field would know how to make it.

As your Honor knows, this random or scientific sampling is not a public opinion poll like the Gallup poll. There they have no way, except by further study of the mathematical laws of probabilities to test the accuracy of their surveys, except in the election itself, by going back and seeing whether they made errors. This is quite different. This is to ascertain the margin of mathematical error in these sur-

veys, and then to try to reduce that margin.

They designed samples which are based upon the amount of revenues that ASCAP receives from the various media, and the various geographical locations of the radio or the television stations, and they take samples, they work out fee performance credits, and they work out mathematical multipliers, in an effort to try to get these as accurate as they can.

Now, each time they take a sample they go back and check for their margin of error, and then they have this checked against tapes, and they use various means and

methods of trying to reduce this margin of error.

[fol. 445] I made a survey of the people engaged in this field, and on behalf of ASCAP I came to the conclusion that Joel Dean, who is a well known professor at Columbia School of Business, has also had his own organization—I would like to claim him as a relative, but I assure you he is no relative of mine—that he was one of the ablest people in this field.

We then suggested his name to the Department of Justice, and we had Joel Dean outline the kind of a survey he was going to make, and the Department of Justice, as I

understand it—I want to make it clear that I personally had no conversations with the Census Department—but I believe they have said that in principle that they thought the method of sampling, and the method laid out by the Joel Dean Associates, was scientifically correct, but they did say that even the best survey would depend upon how it was done, or how economic conditions changed, or whether some new media would come into play as television came in, which to some extent surpassed radio; and that, therefore, there ought to be some means and method whereby the Court, and the Department of Justice, would have some means periodically of checking up as to whether this survey, which Joel Dean Associates started the 1st of October of this year, was correct.

[fol. 446] We sent to all of the members, and have filed with your Honor, a memorandum sent out by the Joel Dean Associates, outlining the various methods of sampling, their multipliers, and how they propose to go about it, and I think as you read that memorandum you cannot help but be impressed with the fact that they say again and again that they have to constantly review their methods, and their data. That is the last memorandum in the book but

one, your Honor.

The Court: Yes, I have it.

Mr. Dean: That is why we put this provision in here, after going back to page 4 of the proposed order, and B reads that:

"After 18 months from date of entry of this order, plaintiff may seek additional relief in respect of the provisions of this section, including the scope, size, or accuracy of the survey. In any such proceeding the plaintiff need show only that the survey does not establish, or is not being conducted in accordance with, generally accepted principles of scientific surveying or sampling; that the economic multipliers do not adequately reflect the dollar value of ASCAP's perform-[fol. 447] ances in these various strata; or that the sample is not of sufficient size or accuracy to present a reasonably accurate distribution of ASCAP's revenues on the basis of its results, and in such proceeding

the court may consider the cost of such additional relief."

There was never, as I understand it, any question but that Joel Dean Associates were perfectly competent and completely independent, but that since they were engaged to establish this survey, and to set it up, on the advice of the Bureau of the Census, the Department thought that they ought to have this additional provision, and since, on behalf of ASCAP, we want to be very sure that the survey was completely accurate, or as accurate as the human mind knows how to make it, we readily agreed to this provision.

Then we also agreed to provision C, II, on page 4, that "The Court, after hearing the recommendation of the plaintiff and the views of the defendant, shall appoint a qualified independent person not an employee of either of the parties who periodically, as is necessary, shall examine the design and conduct of the survey, make estimate of the accuracy of the samples, and report thereon to the Court and the parties. ASCAP shall pay the salary and [fol. 448] reasonable expenses of such person."

There isn't any obligation on your Honor to appoint such additional expert unless your Honor considers it is necessary.

The Court: Then why is the provision in the proposed decree?

Mr. Dean: Because if there were complaints to the Department of Justice, or if upon further submitting the actual results of the survey to the Bureau of the Census, or to other experts, the Department might feel that they would want changes made in the survey, the census on the basis of the survey, that the revenues of ASCAP are to be distributed to its members, we felt it only fair and proper that the Court should have this power, if it wished to exercise it, and that ASCAP should agree to pay for it if the Court wished to have the survey brought up to date by another sampling expert:

That is the history, and those are the reasons why those

provisions are placed in the order.

The Court: The Court, on its own motion, cannot, and because of its own facilities limited as they are, supervise

the conduct of the parties after a decree has been signed, and the Court does not wish to be represented in such a position where it may be regarded as being a supervisor. [fol. 449] That, primarily, is the obligation of the Antitrust Division of the Attorney General's office, and they have authority and power under the law to come in at any time with reference to almost any antitrust decree, particularly a consent decree, with reserved jurisdiction, and apply for a modification of that decree where they find a change of conditions, simply as they would have done here if they had not been able to reach some agreement with your clients.

I do not know but what it isn't desirable to have somebody, as a sort of judicially appointed policeman—let's call him that—who would look at these reports once every three months, or once every six months, and say, "This thing doesn't look right to me," and he files a report to the court.

The trouble is otherwise you are placing a burden and obligation on the Court for which it hasn't the facility or the time, even though it has the inclination, to exercise this supervision.

However, that does not seem to be too important. The point involved here is do you feel, Mr. Dean, representing the Society, that you have accomplished the best possible results in light of the purposes of this suit for the Society as a whole and for its individual members?

[fol. 450] Mr. Dean: Yes, your Honor, I do. I can answer that unqualifiedly yes.

The Court: Are you prepared, after we hear those who desire to be heard, to answer and give your views as to any objection they may raise as to any specific section?

Mr. Dean: Yes, I am, your Honor.

The Court: I do not want to cut you short, and you go ahead with what you had in mind to say, but I wanted everybody to know that that was your position, that you are here not to conduct a debate, but after everybody was through, that you would try to explain what you felt were the major objections raised.

Mr. Dean: Yes.

The Court: All right.

Mr. Dean: To be very brief in about two minutes, your Honor-

The Court: Don't feel I am at all rushing you at this point. I don't want you to feel that way.

Mr. Dean: I do not see any point in going through the decree, because I think it has been very well covered.

I might just say, because Mr. Schaeffer, in correspond-[fol. 451] ence with us, as representing, I believe, an organization—

The Court: That is the member of the Bar from Chicago! Mr. Dean: Yes.—has raised a question as to whether or not we would be willing to take the logs of ABC, the music played over the ABC radio networks, and check them against our tapes.

The answer to that, of course, is yes, we would be glad

I would like to point out, however, that in connection with these local radio stations, that the objection has been made to this so-called survey sampling on the ground that it would be better if we took a complete census. There are something ten million hours played, and if we were to have to do that complete census, and have to keep each log checked, and check it against the tapes, it is our estimate, in which our experts concur, that it would take practically the entire revenues of ASCAP.

So that what we have been confronted here with is to try to get up a survey that is just as accurate as we know how to make it, without at the same time using up every dollar of revenue.

[fol. 452] We could, of course, increase the accuracy of this thing, and then not have any net money to distribute, and I am very sure that that would not be very popular.

I might say at this time I would be quite willing to answer anybody. We are also prepared—your Honor has already ruled on this point, so I won't discuss it at this time—but it seems to us this is not a class action, and that the Department of Justice is fully capable of representing all of the interests of the members.

With that statement, your Honor, I will pause at this time and be prepared to answer any questions, if any

furtner questions are raised during the course of presentation by the friends of the Court.

The Court: Thank you, Mr. Dean.

I think that is a better way, and I am glad you accepted my views on it.

Mr. Dean: Yes, sir.

The Court: Now then, suppose at this time we call each one of the parties who asked to be heard. I am going to hear them one at a time.

I think it would be better to have all of these parties address the Court, before we hear again from Mr. Dean, [fol. 453] it being my idea that as each man talks he may have the opportunity of making a note as to what they said rather than have him speak as each man speaks. That might lead to confusion, and might lead to a debate, and we do not want a debate in that sense.

Mr. Eastman, I think you are the first on the list. Do you mind coming up, and if you gentlemen do not mind using the same rostrum that has been used before, I think it better that everybody hear what you have to say, so that in that way we might avoid repetition of statements to some extent.

STATEMENT BY MR. EASTMAN

Mr. Eastman: May it please the Court, I think offhand, your Honor, it might be helpful if I submitted to you a copy of Mr. Dean's remarks to the general membership. This is by way of explanation—

The Court: I have had a copy mailed to me at each one of Mr. Dean's addresses. As I recall, there was one on August 26th, and there was another communication—that was the address on the west coast of August 18th.

Mr. Eastman: Yes, sir.

The Court: And I have another one that was sent to me, and I have read them all. I have an address in New York on August 27th, and then I have a communication which was sent out under date of October 5th, concerning [fol. 454] the Dean survey, and then I have a further communication which was sent out by the Society on the date of October 9th.

Then, of course, I have the original booklet, which contained a copy of the order which was sent out, I think; early in July.

So those have all been submitted to the Court, and have

been read by the Court.

Mr. Eastman: Your Honor, I represent 54 writers, all of whom have been members of ASCAP for many years. They call themselves the Current Writers Committee. They are serious, responsible writers who in the past year have produced 25 per cent of the ASCAP hits.

At a recent meeting, I believe at the time Mr. Dean addressed the general membership, they had produced.

seven-eighths of the hits ASCAP then had.

Among the 54 I believe there are three or four of the superdreadnaught group, so that this group is an extremely responsible and important segment of ASCAP.

I believe, your Honor, that this problem must be considered in the light of ASCAP itself, because we are merely addressing ourselves to the question of distribution of funds. I think there are related problems in terms of survey, and weighted vote, but we felt that since there [fol. 455] are others addressing themselves to this Court on other issues, and the question of distribution was such an important one, that we would confine ourselves entirely to this terrible issue of distribution.

I would like to add, your Honor, that there is no question about ASCAP's being managed by honorable men, but Balzac spent his entire life talking about this corrosive effect of money, and this has lone a terrible, terrible thing.

The Court: It was nothing original with Balzac. He also talked about other weaknesses of man, didn't he?

Mr. Eastman: We will confine ourselves to money.

The Court: And there is nothing new about that, either.
Mr. Eastman: Now, ASCAP was started, roughly, in
1914, at a time when a tourageous group of men, and a

brilliant lawyer, Nathan Berkon-

The Court: I used to be a lawyer. You can assume I had clients come to me in the early days of my practice of law, right after World War I, and I got a little notice from ASCAP that they were playing these Wurlitzer piano [fol. 456] machines, and I had to get a license for \$15 a

month, or \$5 a month, so I am familiar with the history of it. I looked it up in those days, and my clients paid the fee to ASCAP—they also paid a small fee to me, too.

You assume now I know all about it, and I used to be

a lawyer. Now, let's get down to this thing.

Mr. Eastman: In any event, your Honor, I think it important to know that in so far as a writer is concerned they break into three divisions. You have the superdread-naught group, a group, roughly, of 100 extremely active writers who will, under any circumstances, receive large sums of money. In fact, they receive such large sums that they have generously decided, under certain conditions, not to take \$2,000,000 a year in order that others may be benefited.

You have a second group whom I also call founding fathers, who made great contributions in years past to ASCAP, but, unfortunately, as the years have gone by they have become inactive and unproductive, but they have always felt that ASCAP was theirs, they were the ones who created it, and the pot was for them and nobody else, and in a sense they should have the major share of this distribution.

[fol. 457] Then you have the new group, the current writer, the current writer who feels he is being discriminated against, and who feels he is not getting his proper share.

Until 1950, we had this subjective evaluation system. Your Honor, it was an awful one, because the men who controlled the votes simply said what a work was worth. The result was that those who were in power capriciously and arbitrarily would say, "This work is good, and this work is bad." And the result was a most dreadful system of distribution.

The Department of Justice recognized that, and in 1950, after serious efforts, a change was made and the parties, presumably, enunciated a new doctrine. Primarily, consideration was to be given for performances.

As a result, we had, theoretically, a new system. We now had 20 per cent of the current performances, 60 per cent for sustained performances, and 20 per cent for seniority.

Now, the 20 per cent for seniority was theoretically a way of paying off the founding fathers. The 60 per cent theoretically was a combination of the two. And the 20

per cent was merely current performances.

Now what happened, your Honor, immediately after this decree went into effect? The first distribution one year [fol. 458] later proved that there was a serious dislocation of income for the founding fathers, and the unproductive and inactive writer suddenly found himself with a serious loss of revenue.

Well, it became apparent that this primary consideration for performances would not work for this unproductive and inactive group.

I would like to point out, collaterally, that the super-

dreadnaught group will not suffer under any system.

The Court: Just who do you mean by the superdreadnaught group? Do you mean the men who are fortunate enough to hit the fancy of the times and turn out tunes that are popular?

Mr. Eastman: Forgive me, your Honor. I thought that the government—I simply adopted the government's term, and its memorandum refers to the superdreadnaught group. I thought, for convenience, I would take that.

• The Court: The government uses a lot of terms. Some-

times I discard them.

Mr. Eastman: Well, the top 100 writers, your Honor.

The Court: The top 100 writers you call the superdreadnaughts?

[fol. 459] Mr. Eastman: The government called them

that, and I adopted the term.

The Court: Superdreadnaughts are a thing of the past, I take it. But tell me, seriously, of the carrier ships.

Mr. Eastman: In any event, your Honor, this superdreadnaught group, collaterally, is so active in its own affairs, for example, Mr. Hammerstein is so busy, and Mr. Rodgers, and Mr. Berlin, in producing shows and producing songs, that they have not really got time for the consuming duties of an officer of ASCAP, and the result is that this whole issue has fallen to this second group of inactive and unproductive writers.

What happened in 1950, after it was found there was a

serious dislocation by virtue of the fact that primary consideration for performances was destroying the income of this group?

This is a serious matter, your Honor, and if I am mistaken I would like to have the Department of Justice correct me, but my understanding is-and I have checked this as thoroughly as I know how—that a year thereafter the directors of ASCAP, without the approval of the Department of Justice, changed this 60 per cent performance fund to be divided into two groups, 30 per cent [fol. 460] called sustained performance fund and 30 per cent called availability, but availability is a misnomer and a phony, it is nothing more than sustained performance with brakes.

In other words, under the old 60 per cent formula you could rise or fall as your performances went. With this division of 50 per fent in sustained performances you still had that, but the availability fund, the other half, suddenly developed a series of brakes so that you could not fall during a five-year period, and if you did fall the fall was very, very narrow.

So that this fund improperly labeled availability was nothing more than an attempt to destroy the consideration of primary performances, and to featherbed, so that the inactive and unproductive founding fathers now had a

soft bed for a portion of their funds.

My understanding is that the Department of Justice never gave its approval, and that despite the 1950 amended decree which provided for 60 per cent sustained performances, ASCAP took it upon itself to change this and to destroy the value of the decree, your Honor, because they immediately went back to subjective evaluation in terms of half that sustained performance fund, and promptly went back to benefiting the founding fathers.

[fol, 461] The government, on page 18, has summarized the situation as it existed at that time. In summary, the overall effect of ASCAP's existing distribution system is hat more than 80 per cent of all moneys distributed to authors and composers, members, are now distributed on basis which does not give primary consideration to perormances as contemplated by Section VI of the 1950

judgment. The system further perpetuates the Society's pre-judgment subjective system of classification. Instead of making distribution to its members on a basis which gives primary consideration to performances, under ASCAP's present system some writers initially receive as little as 13 cents per performance, and others as much as \$25 per performance.

Your Honor, summarizing again the effect as I believe the unapproved change in this 1950 decree made it, the

government found-

The Court: Mr. Eastman, am I not concerned only with whether or not this presently submitted proposed decree

is an improvement?

Mr. Eastman: Your Honor, I must relate to the old one, because I will show your Honor, I believe, that a shell game has been practiced, and these are harsh words, [fol. 462] your Honor.

The Court: I am not concerned with the past.

Mr. Eastman: This is the present.

The Court: There is no present. It is either past or future.

Mr. Eastman: I am talking about the future then, your Honor.

The Court: As we talk, it becomes past.

Now, let me ask you, if you don't mind, I don't want to curtail you in any way, but I would like to have your arguments focused so that I can appreciate their full force and effect.

Do you contend that this proposed decree that is now before the Court is not an improvement upon the present decree?

Mr. Eastman: Your Honor, I so propose, and my committee of 54 responsible writers are content to take 1950 rather than take the new decree, and we will so elect as of now. We feel this is the most terrible thing that happened to us.

The Court: Now, one more question. What particular

section of the proposed decree do you object to?

Mr. Eastman: I will get to that, if I may, your Honor. [fol. 463] The Court: Yes. Let me focus my attention on it.

Mr. Eastman: Yes, your Honor.

As I understand it, the reason I went a bit into the past was admittedly 80 per cent of the old system did not primarily represent performances. Now, we can build a very easy syllogism, your Honor, Mr. Dean in his remarks, and the government in their remarks, have indicated that one alternative is substantially the same as that which existed in the past; in other words, not the current performance fund, but the second alternative is substantially the same as the old.

Mr. Dean has stated that as follows-

The Court: Let's keep personalities out. We have no jury here. You are talking now to a Judge who is trying to find out just what he should do, and trying to be fair to accomplish the purpose of the antitrust suit.

Mr. Eastman: Your Honor, I am simply trying to say

this-

The Court: Will you answer my question, so I can find out from you what particular sections of the proposed decree you object to?

Mr. Eastman: I simply confine myself, your Honor, to

[fol. 464] distribution, which is the third point.

The Court: What part of that third point, distribution, do you object to?

Mr. Eastman: 3-A and B, your Honor. 3-A, really.

The Court: 3-A?

Mr. Eastman: Right.

The Court: Is it fair to say that you, speaking for your

clients, object only to 3-A4

Mr. Eastman: No, your Honor. We object to many further portions of the proposed order, but we felt that it would best to heighten the problem for these writers by confining ourselves to 3-A.

The Court: Now, 3-A, as I recall—if I am wrong, correct me on this-is the provision that will ultimately wipe out

that membership distribution, is it?

Mr. Eastman: Well, I think it perpetuates it, your

Honor, under unfavorable circumstances.

The Court: According to the notation here, it is to be wiped out by 1964.

Mr. Eastman: No, I think you are talking about the publishers, your Honor.

Mr. Dean: That is the publishers.

Mr. Eastman: We are talking about writers. [fol. 465] The Court: It has to be 20 per cent.

Mr. Eastman: No, I am sorry, your Honor. I am talking about the entire writers distribution which, if I am not mistaken, is set forth in 3-A of the proposed order. Is that not so, Mr. Bennett?

The Court: I have it. Now, 3-A-

Mr. Eastman: Now, your Honor, I was trying to build a very simple syllogism for the Court by suggesting they now offer two alternatives. Either you go on, theoretically, 100 per cent performances, which is the one alternative, or else you go on the other, which contains four funds-current, sustained, availability of now recognized works, and seniority.

I am trying to suggest, your Honor, that this is a snare and delusion, and that the second alternative of current performances, sustained performances, availability and seniority, admittedly, are improper since they are substantially the old, and I would point out to your Honor a great new factor has been added which makes it even worse for my clients, but I thought that I had an ad mission, both from Mr. Dean and the government, that the second alternative was substantially the same as that which existed up to now, and that the government had set forth that admittedly was not a system which permits of [fol. 466] primary consideration for performances. fact, 80 per cent does not.

I simply tried to indicate that the government had had slipped to it an old shell game by saying "Keep this old system, but for those who want current performances we will give them another alternative called current perform-

I would like to point out it is not so.

...Mr. Dean himself, in the statement that the business of writing is so hazardous that no one wants to accept this feast or famine affair, and take performances, assuming they were 100 per cent, what happened here! If there were a writer bold enough or courageous enough to take such a system, he would be getting 60 per cent of 100 per cent, and not 100 per cent at all. For the following reasons. The government has now worked out, or bought the theory of a qualifying work. Now, a current writer writing current songs does not qualify with his current songs for qualifying works. The government states, in its brief, in its memorandum, that 40 per cent of all moneys paid to ASCAP members is for themes and background music.

In order to get the 100 per cent share of that you must have a qualifying work, your Honor. Thus, you find your-[fol. 467] self in the strange, awful position that even if you have the courage to accept current performances as your sole payment plan you find yourself only getting 60 per cent of the pot or bin, as the government would have it, not 100 per cent.

In addition, what has ASCAP done? It limits you to 39,000 points, your Honor, so that if you get more than 39,000 points you cannot accept that alternative at all. You must now be relegated to the second system, and accept the benefits as they are set forth in the second system. So that again you have this whole affair there of 39,000 points and you are finished, nothing further goes along with that.

I got the impression from Mr. Bennett, I asked him subsequently, whether a recognized work was also included in this affair of current performances, and I was told 'Yes," which means now there are two hooks in this. If you have, a ecognized work, which is not recognized at all, that is a misnomer, it is simply a work one year old—seniority again—if you have a work one year old you can justify for certain background uses—themes, and whatent work, you do not qualify at all. So that you have now a system whereby 40 per cent is destroyed of your fol. 468] total pay, 39,000 points are completely gone, and you have nothing further to say about that.

I obviously suggest, your Honor, this is hardly a fair roposal where they say to a member "You may elect, if ou like to take performances on a 100 per cent basis."

This is not true at all. This is nothing more than 60 percent, and not a 100 percent basis.

The Court: By that I take it you mean then that most members in your clients' position would not take the benefit of the option?

Mr. Eastman: They could not, because they are not

getting a fair shake.

The Court: But they would still have the regular for-

mula to work on, wouldn't they?

Mr. Eastman: Which the government admits was bad. But, your Honor, there is one more point on that current performance basis.

The Court: What would you suggest in place of what

has been proposed?

Mr. Eastman: Well, your Honor, that is a big question. The Court: Well, that is the question, I think, logically that comes to mind of any thinking man.

Mr. Eastman: Your Honor, it would be presumptuous

[fol. 469] on my part—

The Court: No, it is not presumptuous. I have asked you the question. What would you propose instead?

Mr. Eastman: That it become a democratic institution

and paid for performances.

The Court: I know, but that is a lot of-

Mr. Eastman: No, your Honor, a straight performance society.

The Court: We used to say that is a lot of apple sauce.

It means nothing.

Mr. Eastman: Your Honor, I suggest this. Old Man River, of course, is a more important work than Eastman Boogie.

The Court: L know Old Man River, but I don't know

about that Boogie.

Mr. Eastman: Old Man River is, obviously, going to get many more performances because it is a great work, and that is where it will be paid off.

The Court: But, Mr. Eastman, what would you suggest

in place of what has been proposed?

Mr. Eastman: I would rather go back to 1950, because what they have done is—

The Court: You say leave it unchanged, do you?

Mr. Eastman: I do not want to leave it un-[fol. 470] changed, obviously.

The Court: You said go back to 1950, and you leave it

unchanged.

Mr. Eastman: What we are getting now is worse than 1950, is what I am trying to suggest, and I suggest that every song should be considered on its own, paid for on a straight performance basis. Every time you get a performance, you get paid. Cut out themes and background, and don't limit the mathematical formula.

The Court: Sometimes you get so bogged down with a lot of statistics and calculations you end up nowhere. It is like an inventor figuring that he is going to have an invention on which he is going to get a patent, and make so much on each item, and he will sell so many of them, and if he makes so much on each one he will get that much, and by the time he puts the pencil down he has got a millien dollars, but he hasn't got a lawyer to defend his patent.

Mr. Eastman: What I suggest is that you feed into the IBM or Remington machinery the performances, and you have a set of evaluation for your works, all works, and there .

vou are.

But, your Honor, what I am trying to get at here is that [fol. 471] what they did was the most dreadful thing of all, because even under the old system of 1950, which had partially some primary consideration for performances, although the government only found 80 per cont, they now slipped into a fund the thing called recognized work.

Now, a recognized work is nothing more than a work one year old, so that Eastman Boogie is now one year old, it is a recognized work, your Honor, which is a fallacy, of course. So what they have done is this. They have now worked out a system whereby instead of getting heavy performances, they now take availability, which is called the recognized work fund, and it might be the biggest piece of trash ever, but if it is one year old it gets to be a recognized work and gets credit, whereas the finest song less than a year old gets no credit at all.

I am suggesting, your Honor, obviously, for the antitrust purposes of this lawsuit, which is based on a fair distribution system to the members, that the present system is so unfair that the current writer is absolutely destroyed.

To give you a further idea, your Honor, this contribution of \$2,000,000 from the 100 great writers, that was thrown into a pot, where do you think it was thrown? It wasn't [fol. 472] thrown into current performances at all. That alternative was restricted. You could only get the benefit of that \$2,000,000 if you took the second plan, not the first, so that you have not only 60 per cent of the take but 60 per cent less \$2,000,000, because that portion of it is not available to you.

We have very definite notions about what should be done. I really believe that if we had a person of the quality of Senator Ives as a referee in this case to hear all parties that there would emerge a fair basis, because I think this,

your Honor-

The Court: No, that can't be done. There can be no dele-

gation of judicial authority.

Mr. Eastman: Well, your Honor, I sincerely feel that—The Court: That is out. When I mention a man of Senator Ives' standing and ability, perhaps I was a little presumptuous, having spoken to him, for Judge McGeoghan. I gave expression to my choice because I had great admiration, but their function here would be very limited, and it would be limited to simply finding and ascertaining if the law allowed whether or not the decree was working out as we all anticipated, and whether or not there should be changes in the matter of the survey. That is all I had [fol. 473] in mind.

Mr. Eastman: What I am suggesting is what you are now being asked to approve is not an improvement at all, it is a deterioration of the 1950 decree. Here we have serious authors and composers who cherish ASCAP, ASCAP was their lifeline, and it takes a great deal of courage to come in here and complain about ASCAP. But these writers, who represent 25 per cent of the current ASCAP hits, feel they are being discriminated against in the most

awful fashion.

The Court: Don't they have this option? Suppose they don't want to stay with ASCAP? Can't they withdraw?

Mr. Eastman: Where will they go, your Honor!

The Court: There are a number of others in the field. Mr. Eastman: They love ASCAP. This is their home, and they want to stay with ASCAP.

The Court: Let's not talk about sentiment too much

when business and dollars and cents are involved.

Mr. Eastman: Your Honor, we are talking about money. It is like people said "I hate Roosevelt." Other people said,

"Why don't you go to Canada?"

There is no place to go. They are orphans. They are [fol. 474] stuck with ASCAP. It is a collective society. I know the word "collective" isn't fashionable, but there

The Court: I don't know it isn't fashionable. It depends

on what it is applied to.

Mr. Eastman: Even in ASCAP, it is called a conspiracy, your Honor. But they are united for a fine purpose, and they are wed to ASCAP, and no place else.

BMI, the other system, doesn't recognize writers, your Honor, in terms of a fair payment. They have no place to go but ASCAP. If therê were an equivalent society, well, it might be realistic to say they can go to another society, but BMI is essentially a publishers' society, has no place for writers, writers don't get a fair shake at BMI.

The Court: I am not concerned with that now.

Mr. Eastman: All I am suggesting, your Honor, is that

there is no place for them to go.

The Court: But, you know, the thought comes to my mind that if you people who are members of ASCAP can't agree amongst yourselves as to what is fair, when the government has made an impartial study and recommends it, you might wind up with no association at all, and you will all have something to worry about.

[fol. 475] Mr. Eastman: Your Honor, that is a threat— The Court: And that is something you might turn over

in your minds.

Mr. Eastman: Your Honor, that has been the threat

used by-

The Court: No, that is no threat. I have no interest in this thing at all.

Mr. Eastman: I know that.

: The Court: It is just an observation.

Mr. Eastman: The government never hurt us. The government never hurt our committee. They bought a system which is so totally improper, and really it doesn't make sense, because ASCAP is a great society if it would use its brains and not get involved so much with favoring a few as against the large group.

The Court: There are a couple of decisions, you know, that seem to indicate that even ASCAP under the consent

decree is skating on thin ice,

Mr. Eastman: I recognize that, your Honor. It took great courage to come here on behalf of this committee, because they do not want to do anything to hurt ASCAP.

The Court: It did not take courage to come in any district court of your country and speak up. They have a [fol. 476] forum here. Have you anything else you want to

point out to me?

Mr. Eastman: I want to summarize, your Honor, this comes down then to a very simple affair, that under the new proposed order this group of serious writers is in poorer bargaining position than under the decree of 1950; that the alternatives are not fair alternatives; and that the order does not set forth a distribution system which provides for primary consideration for performances.

The Court: All right, sir. Thank you.
Mr. Eastman: Thank you, your Honor.

The Court: Mr. Cheyette?

Mr. Horsky!

What I was going to suggest is that if there are any other lawyers from out of town, I would like to hear them this afternoon, in case they wanted to go back. For instance, Mr. Schaeffer is from Chicago.

Mr. Fishbein, you are from New York, aren't you!

Mr. Fishbein: Yes, sir.

The Court: So you would deal through Mr. Schaeffer, wouldn't you?

Mr. Fishbein: I would.

The Court: And Mr. Rothstein, Mr. Zissu, are from New [fol. 477] York, and Mr. Niles and Mr. Kaufman.

Suppose then as a courtesy to Mr. Schaeffer, being that

he comes from Chicago, we hear him after Mr. Horsky. Is that all right?

All right, Mr. Horsky.

STATEMENT BY MR. HORSKY

Mr. Horsky: Your Honor, I have preliminarily somewhat the same reservations about this case that Mr. Dean expressed. He has had at least the advantage of probably two or three years of experience with it. I have had perhaps a tenth or less time, and I will speak with some trepidation before a group that is much more knowledgeable about this than I. I hope, however, I can contribute a little something more by way of what I say to your Honor's understanding of the true issue that is really before you.

First, let me recall very briefly what this whole basic proceeding is. It began with a complaint by the Department of Justice alleging, in effect, two conspiracies, or perhaps one large conspiracy with two objects. The first conspiracy related to the monopolization or attempted monopolization of the musical works of the country, and related to ASCAP's dealings with its licensees, or people

who wished to be its licensees.

The Court: Excuse me, you gentlemen who have come [fol. 478] in, there are seats in that front row, aren't there? You don't have to stand there.

Excuse me, sir.

Mr. Horsky: Surely.

This problem was resolved by the 1941 decree, touched on again in the 1950 decree, and is not now before your

Honor at all. We can put that all to one side.

The second part of the 1941 consent decree, the second part of the government's 1941 complaint, if I can put it that way, related to an internal conspiracy inside ASCAP, a conspiracy by the dominant people in the Society to utilize their position in the Society to advantage themselves competitively against the other members of the association.

Let me interpolate by saying I am going to speak on behalf of publishers, and I will talk about the publisher part of the problem, not the writer part of the problem.

Now, in the 1941 decree there was an attempt made, as

the government has outlined, a modest attempt to prevent this anti-competitive conspiracy inside the Society from continuing to function. It was a very mild attempt because, I suspect, the focus of the Court was largely on the external [fol. 479] activities of the Society rather than the internal.

Within nine years it became apparent that the 1941 decree was inadequate, and it had to be fixed up with respect to this internal conspiracy, and some efforts were made to

improve the situation.

Most of the problems remained really unsolved because the language was made too general, as the government suggested. It really did not do it.

So, we come before you now to deal with only that problem, the problem of the internal arrangements of the So-

ciety.

The Court: That is right. Now, at this point—I don't want to interrupt you,—

Mr. Horsky: Do, your Honor.

The Court: You are very experienced in the field of antitrust litigation. Suppose now I say there is essential discord in ASCAP itself, and among its members. Suppose I say it is not part of the Court's function to attempt to regulate by means of a consent decree, a decree which is not agreed to by a substantial portion of its members, and I deny approval of this decree? What do you think is going to happen then?

Don't you think then that the government will open its [fol. 480] case, and proceed to trial, and say, "Well, we offered you the opportunity of a consent decree that was workable, and which would serve our aim and our purpose. We spent some time with you to try to work it out. You couldn't agree amongst yourselves on what you were willing to take as satisfactory. Now, we are going to go to

trial and let a court decide this issue."

At that stage, what do you think is ultimately going to happen to ASCAP? You don't have to be a magician to dope that out, do you?

Mr. Horsky: I have a very different opinion than what

I think you are suggesting.

The Court: Do you see what I have in mind? Either ASCAP comes in and says, "Here, we will do what the gov-

ernment wants, and we won't ask the Court to bother too much about our internal affairs, we vill work those out and iron them out amongst ourselves," or the government is going to say, "Well, we tried."

The Court is liable to say, "There is such a sharp conflict here that maybe this thing ought to be litigated."

Have you ever thought of that?

Mr. Horsky: Yes, sir. I have an answer to that, and I [fol. 481] want very much to be able to say it.

The Court: What do you think will happen to ASCAP

in that event?

Mr. Horsky: I want to correct one impression that underlies your assumptions, which is basic to the position that I am making here.

The Court: This is no assumption. These are all hypo-

thetical situations.

Mr. Horsky: No. You have made an assumption, your Honor, I beg your pardon, and that is that the government has been negotiating with ASCAP. It hasn't been negotiating with ASCAP.

The Court: Now, wait a minute. Mr. Horsky: Let me explain that.

The Court: Wait a minute. There we are hitting something very vital.

Mr. Horsky: That is right, and that is the reason I want

to explain it.

The Court: And which I basically differ with you on. These members have associated themselves in a group. Now, either they have designated somebody to act for them or on their behalf or they haven't. If they have never designated anybody to act for them or on their behalf, we have no consent decree which we can modify, and there is [fol. 482] nothing now before the Court.

Either ASCAP has a governing body or a representative body, or it hasn't. And if you maintain that those men who in the past have appeared on behalf of the Society as a juristic entity have done so without authority, there is

nothing before this Court whatsoever.

Mr. Horsky: I want to explain that, your Honor. I realized that statement would shock you and—

The Court: It does not shock me at all, but it follows

with certain logical consequences that there is nothing be-

fore me now.

Mr. Horsky: Let me explain it, sir. The challenge that the government made in 1941 was what they called the dominant members of the Society. Let me call them, for convenience, the top 12 members in point of reference. They were misusing the Society for their own purposes. That was the charge. Efforts were made in some decree from prevent them from doing that.

The purpose of this proceeding in 1959 is to prevent

them from continuing to do that.

Now, the negotiations have been with the top 12. The issue in this case is whether these top 12 have given up enough of the power which the government says they ille-[fol. 483] gally possess, and improperly possess, so that you can get a fair administration of the Society. This has been negotiated by people who are accused of violating the antitrust laws by overreaching their competitors, who are the other members of the Society.

The Court: Mr. Horsky, don't you miss, and don't you just skip over, the basic question, and that is: Is ASCAP a

juristic person performing?

Mr. Horsky: ASCAP is before you as a juristic person. Also, all of its members are before you.

The Court: There we differ.

Mr. Horsky: They were named in the complaint.

The Court: I do not care whether they were named in the complaint or not. They may be named in the complaint as independent and separate conspirators, and as co-conspirators.

Mr. Horsky: Co-conspirators.

The Court: But if ASCAP is a juristic entity, then I only hear you as a matter of courtes, as a friend of the Court. If it is not a juristic entity, I have nothing before me upon which to act.

Mr. Horsky: Well, it is before you, your Honor, clearly, because it was a defendant in the original case. This proceeding is designed to modify a decree entered in 1941, and [fol. 484] amended in 1945, in a case where the complaint is on file here.

The question we raise, and the reason, your Honor, to be perfectly frank about it, the reason we sought to intervene, is because we do not believe that these people who have negotiated the decree can adequately represent the interests of the other members of the Society whom they stand accused of having improperly dealt with in the past. I represent the people—

The Court: Isn't that a matter to be determined in some

state court litigation?

Mr. Horsky: No, sir. That is before your Honor. That is exactly what these questions are. These questions are whether these provisions, which cut down the power of the top 12 publishers, by a considerable amount, are cut down far enough. That is the problem, your Honor.

Now, let me answer the other part of your question, because I think it is important. You say what would happen

if you should reject this decree?

The Court: Yes.

Mr. Horsky: It seems to me that it is probably in this posture at that point. The government unquestionably has [fol. 485] the power, as your Honor pointed out a moment ago, to come into this court and seek a modification of the consent decree. It does not have to have the consent of the defendants to do it. If it does that, there will be a hearing before your Honor, there will be testimony taken, there will be evidence, witnesses, exhibits, and whatnot, and your Honor will decide whether the government's proposed modification should be approved or should not be approved.

At that point, I would hope that we would be allowed to participate as intervenors, also, but that would be another question. That seems to me to be what is the alternative. It is not necessary for your Honor to find ASCAP the dominant group that has negotiated this consent to this decree in order to have power to act. I take it even under the present posture, you are not regarding this as something you must accept or reject without dotting an "i" or cross-

ing a "t".

The Court: I certainly do. I do not believe that I am an arm of the Attorney General's office. I function as an independent.

Mr. Horsky: You accept this?

The Court: No. I function as an independent judicial officer.

[fol. 486] Mr. Horsky: That is right.

The Court: However, the proposed decree provides that it shall be submitted, or the way it is going to be signed, if it is signed, it will have to be consented to by the ASCAP membership.

Mr. Horsky: That is right.

The Court: It will have to be voted on by the ASCAP membership, wouldn't it?

Mr. Horsky: That is right.

The Court: Not by the board of directors.

Mr. Horsky: It is voted on by a board that has a weighted vote.

Let me come to that. Let me explain how this voting works.

There is no question at all that at the moment the top 12 publishers—and I am talking about publishers now, and I want to be clear about that. These top 12 publishers have a majority of the total vote of the Society. If they negotiate this decree, and your Honor should say, "Well, all right, if it is approved by ASCAP it is okay with me," they have got the vote to put it over whether anybody else cares or not.

I am talking about 1 per cent of the publishers in this Society. They have 63 per cent of the total votes.

[fol. 487] Now, you say it is submitted to ASCAP for their approval. It is hardly a fair characterization of the situation to say that it is submitted to ASCAP, when you have a weighted vote.

Let me call your attention from time to time to the memorandum we have submitted. It is a long mimeographed business here.

The Court: Yes, I have it here.

Mr. Horsky: Dated October 19th. And it has a few

statistics and figures in it.

Let me say, parenthetically, that it is rather difficult to proceed in this case because there is not any record, there aren't any facts, there is not any material upon which you can talk. However, we have been fortunate in obtaining from the board of directors at ASCAP some figures. We

also had the fortune of having a hearing before a Congressional committee a year ago at which much testimony was taken, under oath some of it, a lot of exhibits were supplied, and we have liberally footnoted the statements in this brief to the statements and to the evidence, if we can call it that, adduced before the Congressional committee.

The rest of the material stated in here as fact is material that we are prepared to prove by testimony or ex[fol. 48] hibits, if we are afforded the opportunity in this

matter.

The Court: I understand that is no offer of testimony made here by anybody, and ASCAP's position is that if the Court undertakes to take testimony it wishes to withdraw any consent, tentative or otherwise, which it may have given. Is that correct, Mr. Dean?

Mr. Dean: That is correct, your Honor.

Mr. Horsky: If you will look at the bottom of page 16, your Honor, you will find, roughly speaking, the traditional 10 members of the board have, since 1954, controlled—received that portion of the revenue which, since voting, is directly related to revenue. It means that they have had a majority of the total votes of the Society.

I cannot emphasize too strongly that when I speak for these applicants that I represent I am not speaking for— I have no connection with the top 10 members, I am speaking for people whom the government alleges it is protect-

ing against those top 10 members.

The statement that your Honor made in denying my motion for leave to intervene was that I had joined the Society, and I must be bound by it. Well, in a sense, of course, that is true. But in another sense, and in a much more [fol. 489] realistic sense, I submit, you have before you the problem of whether to approve this order. You have the power to do complete equity, and I am sure you are anxious to do equity.

The Court: I have that power, but I want to point this

out to you, Mr. Horsky.

Mr. Horsky: Yes!

The Court: My power is limited to the exercise of judicial discretion, to either approve or disapprove. I cannot compel either one of the parties to this suit to give their

consent to a modification other than as embraced in the proposed decree.

Mr. Horsky: I think that is right.

The Couft: Either I approve it with their consent, or I say "Even though you have agreed to this, I cannot do it in good conscience and in the exercise of discretion."

Mr. Horsky: That is right.

The Court: Now then, if I say "I want this put in there, or that provision changed," and either one of them says to me, "We can't do that," there is no way that I can, in this informal hearing, compel them to do it.

Mr. Horsky: That is right.

The Court: And that means then that you reopen this [fol. 490] litigation, and that you have a trial. And I think that that trial embraces not only the usual modification of a consent decree, but it may well embrace a trial de novo.

Mr. Horsky: It could.

The 'ourt: Which will go far beyond any provision of the consent decree as originally entered.

Mr. Horsky: It could, but it need not.

The Court: If a Judge is going to undertake this, he is going to go fully—I know if I were, I would go fully at dength to finish this matter once and for all, and I am afraid that such litigation might possibly ring the death knell of ASCAP, and other similar associations.

Mr. Horsky: Your Honor, if you please-

The Court: And I have so expressed it in opinions before.

Mr. Horsky: Yes.

The Court: Now, if you want that, and that is the determined chase of the members of ASCAP, there is nothing I can do about it. I think that this licensing of copyrighted music is a very pressing problem. Perhaps you might reach the stage where you may get a compulsory licensing on a [fol. 491] minimum statutory fee-basis as you do on phonograph records.

Mr. Horsky: Your Honor, I would like to say once, and I will pass on, that I see no insuperable problem in this decree, this proposed decree, if it were to be projected to the government coming in with a decree which reflects what your Honor would presumably say in a written opin-

ion as to what you thought were the inadequacies of this proposal, and asking approval. At that point there would be a hearing on whether it should be approval, and AS-CAP—

The Court: I cannot approve that over ASCAP's objec-

tion without having a full fledged trial.

Mr. Horsky: Without having a hearing. You do not have to have a trial.

The Court: Without having a trial. Mr. Horsky: Witnesses, that's right.

The Court: Witnesses.

Mr. Horsky: That's right.

The Court: Now then, since the original decree was entered into by consent, once I begin taking testimony the original consent decree is no longer valid.

Mr. Horsky: Oh, your Honor, I would like to submit a

memorandum on that.

The Court: You can submit a memorandum on it, if you fol. 492 want, but I have in mind the case that you have in mind, too. I have in mind that case.

Now, let me ask you one question, so I can focus my attention on your objection. What specific provisions do you feel are especially objectionable?

Mr. Horsky: All right, let me come to that. I wanted to outline the basic problem that I saw here, and now let me come to the specific.

The Court: You and I see the basic problem, and I think

it is the same.

Mr. Horsky: The basic problem is that the people who have negotiated this decree do not truly represent ASCAP, the members.

The Court: What do you find is objectionable!

Mr. Horsky: Let me go on to what I find is inadequate. First, let me come to the proposed voting system. The government has denounced the present system, as you have heard Mr. O'Donnell state, because it says 99 per cent of the publisher members are, in effect, disfranchised, and the dominating group of publishers who are less than 1 per cent hold absolute power in the Society by virtue of 67 per cent of the votes. They can cast that many, no matter what everybody else does.

[fol. 493] Now, one of the antitrust purposes of this suit, which your Honor has mentioned in your July order, has a factor to be considered in evaluating this proposed decree, is whether there shall be a democratic administration of the Society.

The proposal I submit to you, and then I will analyze it, does not change the Situation. It leaves the dominant pub-

lishers in control.

The Court: Would you say it is an improvement on the existing decree?

Mr. Horsky: I suppose it is an improvement, if you cut it from 64 to 63.

The Court: It is an improvement?

Mr. Horsky: It is an improvement, yes.

The Court: In other words, under this consent we would have a more non-partisan—let's not get into the realm of politics—we would have a more non-partisan administration.

Mr. Horsky: No. It would be just a little different.

The Court: You concede it would be better than the

present?

Mr. Horsky: It would not change the complexion of the board of directors. On paper it is better because you re[fol. 494] duce their majority from 64 per cent to perhaps 51 per cent, and perhaps somebody would leave the
dominant 10 and you might actually lose the majority.

Let me explain to you how this actually works. This is supposed to be a system which prevents people from hav-

ing a position of unfair advantage.

Now, let me be clear that your Honor understands that the directors of this society, the board of directors, have tremendous power. They are the managers of the Society. They are the people who appoint all the officers, who appoint all the employees, who supervise the analysis of the formulae for distribution, supervise the distribution. So that when you are talking about the directors, you are talking about the real people who run the Society.

Now, the assertion is made, your Honor, that under the new system the percentage of the total votes for publishers now represented on the board of directors is cut from 56 per cent down to something about 30 per cent.

No, from 63 per cent down to 37 per cent.

Actually, it can immediately be increased from 37 per cent to 41 per cent by a readjustment of the affiliated meinbers of this group, and it would undoubtedly be so adjusted [fol. 495] up to the 10 per cent limitation Mr. O'Donnell explained.

Incidentally, your Honor, this is all spelled out in the

memorandum I have filed at pages 20 and 21.

The Court: It is spelled out in page 34 of the remarks of Mr. Dean on the West Coast, isn't it?

Mr. Horsky: Yes.

The Court: On August 18th, he points this out. 37 and 41 per cent from 63 per cent. What they have done, apparently, according to what appears to be correct—I have checked up on this, the statistics and the mathematical calculations seem to be accurate—they have cut it down from 63 per cent to 37 per cent, and with the affiliates they have cut it down from 78 to 41.

Mr. Horsky: That is right.

The Court: Now, I-

Mr. Horsky: Excuse me, I don't want to interrupt you. The Court: That has cut it down from majority to a minority.

Mr. Horsky: No, sir. Let me explain.

The Court: Go ahead.

Mr. Horsky: That is a figure which is based on the total [fol. 496] possible votes cast, which could be cast. I would like you to look at page 22 of my memorandum, your Honor, and you will see that the actual vote is considerably less than the total possible vote.

The Court: I know, but that is not unusual. We know as a matter of common business affairs that the average large corporation, a controlling interest is not 51 per cent in a large publicly held corporation, but if you have 25

or 26 per cent you manage the corporation.

Mr. Horsky: That is correct.

The Court: People don't bother signing proxies.

Mr. Horsky: That is exactly what we are complaining

The Court: But that is due to their lack of interest.

Mr. Horsky: You have here, your Honor, a vote which amounts to somewhere in the neighborhood of 86 per cent. total, of the vote actually cast, valid vote cast. And if you add to the 10 largest publishers the two standard publishers who comprise the 12, you will find that the votes of the people, the dominant publishers represented on the board of directors now, are actually a majority of the total votes that will be cast and valid in the average society election. [fol. 497] What I have asserted, and what I am prepared to prove, is that the change that has been made in this decree is not a change which democratizes the Society in the slightest. It leaves the absolute power over the board of directors precisely where it is now, particularly since, as your Honor said, it is not necessary to show 51 per cent to control a society of this sort. The 12 publishers who are presently represented on the board can pick up some votes. even if they started to open with 25, as you say. The rest of the votes are widely dispersed, 25 per cent is control. And we are talking, your Honor, about a charge that this group is a little conspiracy of its own, and that it, this little group, has been misusing its powers at the expense of the other members. That is what I want to be sure you understand, because it is this group which remains in con-

The Court: What would you suggest to the government on this?

Mr. Horsky: I would like to suggest this, your Honor. The best solution to this is not the one which is to give everybody one vote. That is not the best solution. That

is one possible one.

The best solution, it seems to us, is to divide the board [fol. 498] of directors up into categories, and let the tep 12 elect 4 directors, let some intermediate group of publishers with the next largest participation in the Society's affairs elect 4 directors, and let the large group who have a limited participation elect 4 directors. This will give some kind of a reasonable participation in the governing organ of this Society to all of its members.

It would certainly be far superior to this which will completely leave it just as it is now, with the same people

voted into office regularly with their 50 per cent-plus votes voted into office regularly.

The Court: The trouble is then that you are approach-

ing it from a numerical basis.

Mr. Hørsky: No.

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The Court: From the number of membership, rather than from the type of membership, and what each member contributes, and, statistically, it sounds nice, but from a business point of view it does not add up to sense.

Mr. Horsky: Your Honor, this group that is in there now

stands accused by the government-

The Court: All right. Apparently, they wouldn't consent to it anyway.

[fol. 499] Mr. Horsky: They probably would not.

The Court: What else do you find wrong or objectionable with this voting point?

Mr. Horsky: May I have one or two more minutes on the voting point to make one or two comments which I think are brief, but important?

The Court: All right. I thought we would take a fiveminute recess, what I intend to do, if it is all right with everybody, I would like to hear Mr. Schaeffer today, so he does not have to come back from Chicago, unless his retainer calls for his attendance here tomorrow.

Mr. Schaeffer: I intend to remain over.

The Court: Does your-retainer call for your attendance tomorrow?

Mr. Schaeffer: Yes, it does.

The Court: Then I do not have to be too solicitous. We

won't interrupt Mr. Horsky.

We will take a ten-minutes recess to take a stretch, and give the stenographer a rest, and I will sit today until ten after 4. I have some people coming up at a quarter

(Recess.)

The Court: My statement was that I should allow two [fol. 500] days for this, and I think it is a fair estimate. Continue.

Mr. Horsky: There were two other matters in connec-

tion with the voting arrangements of this proposed order

that I would like to call to your attention.

The first one is, apparently, a slight concession on the part of the dominant publishers that there might well be at least one director who was not of their group, and, consequently, they have consented in this proposed order to paragraph 4E, which provides that any group of publishers combining one-twelfth of the total potential publisher votes may elect a director by the process of nominating him.

Actually, the only conceivable group that could possibly get together in favor of a single representative on the board of directors—this would be publicly done, not privately done—with the possibility of reprisals, the possibility of

all sorts of things of that nature—

The Courte What reprisals could there be? You speak of reprisals. What reprisals could there be?

Mr. Horsky: Your Honor, this Society-

The Court: I mean what reprisals could there be for [fol. 501] which there wouldn't be either a remedy in either the Penal Law or by reason of a civil action?

Mr. Horsky: The possibilities, your Honor, are the possibilities which is designed to prevent, and which it does not adequately prevent, I assure you. To cut down the man's money, as what it really means, by determining the subjective determinations that the board of directors makes which determine the amount of revenue he gets.

The Court: If they are going to make those determina-

tions according to a set formula-

Mr. Horsky: No, they are going to make them subjectively in many cases, your Honor. I am going to come to that. In many cases the government will admit these are subjective determinations, not mathematical, not ones where you simply sit down and rule it out with a ruler and say how much. They are subjective determinations. In any event I suggest a provision which requires that at least 11 of the top people the dominant group get together on one publisher to be a nominee to the board of directors is not an adequate solution to the evil that the Government points out in its papers, and that is the domination of this Society by this group.

[fol. 502] The Court: Now, on that, don't you feel that this provision, which provides for representation by one director of a 1/12 group, is an improvement?

Мт. Horsky: Yes, it is an improvement.

The Court: Under this-

Mr. Horsky: I would say it is about a one-thousandth of 1 per cent better than it is now.

The Court: It is at least 1/12, isn't it?

Mr. Horsky: Certainly not, because you assume that if we have 1/12 of the directors not part of the dominant group that one has some power. He doesn't have any power.

The Court: I know, but don't you go on the assumption that only 1/12 of the writers or publishers with the votes will get together? Suppose there are three or four groups of 1/12? What is to stop that? What is to stop three or four groups of the writers, and three or four groups of the publishers, getting together, each having within their own group 1/12?

As I read this, I thought this, of all, was a substantial improvement. This, to me, and I am surprised reading it, Mr. Horsky, that you speak highly in protest against it, honestly.

Mr. Horsky: I do not speak in protest against—
[fol. 503] The Court: I recognize this one provision as being a step in the right direction, and I did not think that you were going to criticize this.

Mr. Horsky: I want to make it clear to you I am commenting on this provision because I want you to understand it is not a substitute for a fairly elected board of directors.

The Court: It is a step, and a substantial step, in that direction, but it is not perfection in and of itself. It is part of plan that may seem to be not perfect, as most of the things that man does on this earth are not perfect by any means, particularly when he is handling money matters. He becomes very selfish. It is human nature. And unless you are possessed of a great love for your brother man you want everything for yourself, you know. That is human nature. But this seems to me to be a step in the right direction.

I really thought that that said, when I read this yester-day—I read it again yesterday; I have read it about five times—and I said, "Now, that is something I don't think anybody will have any objection to." And you really dis-[fol. 504] appointed me.

Mr. Horsky: I am sorry. I still object. The Court: All right, go ahead.

Mr. Horsky: You haven't persuaded me.

The Court: Sirt

Mr. Horsky: You haven't persuaded me that I shouldn't

object.

The Court: No, I don't hope to dissuade you from that. It is like trying to convince a persistent lady. Sometimes the better part of prudence is, even when you recognize your wife is wrong, not to let her have her way but to let her say what is on her mind.

Mr. Horsky: I will leave this voting matter with a request that you examine our memorandum which details some of this in more detail, but I would like, once again, to summarize why we are opposed to this provision of the decree, which is essentially the provision relating to the

weighted vote.

The Court: Your basic opposition, as I take it—see if I correctly state your position—is, No. 1, ASCAP, the juristic entity, should not be recognized as a consenting [fol. 505] party, that they are not in a legal position nor in an economic condition for the Court to recognize them as a party which it should be considered.

Mr. Horsky: That isn't the way I would put it.

The Court: That is the logical consequences of what you say.

Mr. Horsky: Let me put it that way.

The Court: If that is so, then I can't approve any of this Mr. Horsky: Let me put it my way. This proceeding which is before you now is brought because of an internal dispute in ASCAP. It is brought because the Government charges that a dominant group in ASCAP is misusing the Society and diverting revenues unjustifiably, taking unjustified advantage of its competitors, who are the other members.

Now, you have inevitably, therefore, a dichotomy before you. You have the dominant group which stands accused of these practices, and you have the rest of the Society.

Now the dominant group is going to be restrained pro [fol. 506] tanto, by the decree which you have before you, if you approve it. I say pro tanto because it is going to be restrained only, in my judgment, slightly. But nonetheless, that group, which stands accused, and which is going to be restrained pro tanto, is the group which is being negotiated with on the decree, which has negotiated the decree.

It is the defendant. It purports to be the Society.

The other members of the Society, who are alleged in the Government's own papers to be the victims of this conspiracy, and to have been suffering for the last nine years, or for the last 19 years, as a result of the conspiracy of this. dominant group, and I am quoting the Government's papers now, not my assertion—is the group that is not represented at this hearing, except as you are permitting me now to speak. That is the reason I am intervening.

The Court: Don't you overlook one very important thing, and that is this. That the Government, represented by the Attorney General, is acting impartially to accomplish a just result, and that it is protecting not only the public but it is protecting, as best it can, and to the extent that it feels [fol. 507] it should, this minority group, including the minority group for which you speak? Don't you overlook

Mr. Horsky: No, I do not overlook that. I have not been addressing myself to that yet, because that is not the basis on which your Honor ruled out my motion to intervene in the first instance. You said I was represented by the Society.

The Court: Wait a minute. Excuse me. I think you have overlooked one of the reasons why I denied you a right to ntervene. I denied you the right to intervene first, because ou were represented by the Society, and by the Society with your consent, you having become a member of it.

Mr. Horsky: That is right.

The Court: Secondly, I denied you the right to intervene ecause you were not a named party to the suit, and the int had proceeded to a consent judgment.

Third, I denied you the right to intervene because I felt that the interest that you represented and wanted to speak for was represented by the Government in the person of the

Attorney General.

[fol. 508] Mr. Horsky: All right. Now, let me speak to —I think I have addressed myself to why I believe the Society, in the person of Mr. Dean, and the board of directors, who speak for them, today, does not represent me, or my client.

The Court: I am not going to hear you at great length

on that.

Mr. Horsky: I do not want to take any great length of time.

The Court: Let's confine ourselves to this decree.

Mr. Horsky: Let me say one word why the Department of Justice does not, and it is as simple as this-

The Court: I would prefer, though I do not want you to be precluded from going into it, I would prefer you did not.

Mr. Horsky: All right, let me go on to the next thing to which we object.

The Court: All right.

Mr. Horsky: I think I have already stated what our alternative proposal would be. One which I hope will commend itself to your Honor, and which your Honor might—[fol. 509] The Court: Suppose it does not commend itself to me? I have no right to compel anybody to consent to it.

[fol. 510] Mr. Horsky: No, sir You can reject this one, though, with the suggestion that you would approve something different.

The Court', No, I don't do that.

Mr. Horsky: Then you can reject this one.

The Court: I am not going indirectly, without hearing evidence, to prejudge a case, and that is what you are asking me to do.

Mr. Horsky: I am not suggesting the need for that, you

Honor. I thought perhaps you would.

The Court: I can't do that. I am without authority to do it.

Mr. Horsky: I thought if you rejected this order you

would write an opinion.

The Court: No, Mr. Horsky. My power is limited either to approve it or disapprove what is submitted to me, that

Mr. Horsky: Very well, I will talk to it on that basis. The alternatives which I am suggesting would be those then that I would hope that the Government would propose to your Honor over ASCAP's objection.

[fol. 511] Now, let me go on to my next point. The second part of it, to which we object, is the portion which is in Section II of the proposed order relating to the objective survey of the performance of the works.

Section II of the order purports to improve the mechanics, or the provisions, of the 1950 decree with respect

to per cent. -

We have heard this morning an elaborate explanation of this proposal in terms of the sampling techniques which are now possible. I have no quarrel with the comments that were made about sampling techniques. I think you can make samplings that are pretty good. I have recently participated in a litigation in which that question was litigated, and we proved quite conclusively that the process of random sampling is a pretty good process.

· That is not the point to which we have objection. There are two parts of this which make what you do to the system, what Joel Dean Associates will do, almost completely irrelevant. A sampling system is no better than the data which is fed into it, and that is what the trouble is with the present system, and that is what is the trouble with the

[fol. 512] proposed system.

There are two objections, two fundamental difficulties, and I will state what they are, and then I will take them up one at a time.

The first one is the survey procedures inside ASCAP. I am talking to the part on page 36 of my memorandum.

The second part relates to the survey-

The Court: I will be happy to turn to that page.

Mr. Horsky: The second part refers to the survey of local radio and television performances.

The first one of these is the procedures inside ASCAP. This is the group—I am talking now about the ASCAP program department which is directly under the distribution department which is directly under the board of directors about which we have been talking, and this is where the discretion comes in which I have mentioned.

You have in this part of ASCAP a number of employees, some 250 people, who are taking the material, the raw material which is produced by the Joel Dean Associates random sample, and collating it, and tabulating it, and identifying

[fol. 513] it, and what not.

There are a number of nice questions that come up in connection with how you put this particular bit of music, or that particular bit of music, into the system. All of this is done now, as you will see by the testimony which was given in the Congressional Committee which I have quoted in the brief, on the basis of verbal instructions. One of the clerks has a question and she asks somebody up the line, and it goes up and comes back down, and they make decision on the basis of which the tabulation is made. This is all before it ever gets to the random sampling numerical multiplication. This is the raw material. This is all done on a verbal basis, and when there is a question that comes up as to how it should be decided it goes to a group that is called the classification committee, which is the board of directors sitting as a classification committee. And they decide these questions as to whether it is to be in this category, or . in that category.

This is all done, in other words, by a group of people, [fol. 514] an organization, under the direct supervision of the people who stand accused by the Government in this proceeding of having overreached the other members of the Society. And the organization leaves to that group the final decision, subject, I will admit, to an ultimate appeal to which I will come in a moment, to the American Arbitration Association, if you choose to protest. But the decisions

are innumerable.

Let me illustrate how complicated they can be, and how difficult they can be, by looking at the machinery for the local survey. Mr. O'Donnell suggested that the decree improved the local survey machinery by increasing the sam-

pling by 50 per cent. That, I think, is a correct statement, but I think that he should more accurately, or perhaps it would have been a bit more informative, if he suggested that the survey of the local music has been increased from .2/10 of 1 per cent to 3/10 of 1 per cent.

That is the procedure which is proposed in the pro-

posed decree.

Now, it is important to have the local music survey, because by definition it is different than the network. Local [fol. 515] music over local stations is much more apt to pick up the works of the people that I represent than it is the works of the dominant people on the board of directors. And it is important, therefore, that this be done as well as possible. It produces about 3/5 of the revenue of the Society, local radio and television, and it is going to be done on this very, very minuscule percentage.

Now, the way it is done, your Honor, they have people that go out and put tapes on these local stations. These tapes are run for-well, Joel Dean Associates will say which station, and for how long, and what city. They come up with tapes, which is really just the program of the station. From a tape it is mailed back to New York, and some 250 girls, clerks, try to find out what the music is

on these tapes.

Of course, many songs are announced—the singer, the name of the work, the name of the author-appears on the radio program, and you can tell by just listening to the tapes. But a tremendous amount of the music that appears on a local radio station is not announced, and this is particularly true of the non-featured music, the theme [fol. 516] music, the background music, the cues, the bridges, the jingles.

This, theoretically, your Honor, and I say theoretically with all sincerity, is supposed to be identified by these

clerks from just listening to it.

The Court: You would be surprised at the facility with which some of these young people can do it. Even my five-year old grandchild will tell me the name of a song on a television or radio, and I don't know what it's all about. The same as he can tell me the make of an automobile that is driving by on the street. They perhaps pay a little more attention to it.

Let me ask you a question on this:

Mr. O'Donnell says that whereas before, has a basis of distribution, they gave the network programs a standing of two-thirds, and local programs a one-third basis, and the income from those sources were in a reverse order, now they have changed that and they have made it more realistic.

Do you agree with that statement?

Mr. Horsky: Yes, I do. That is better.

[fol. 517] The Court: Don't you agree, or de you agree—perhaps I should not put a leading question—do you feel, or is it your position, that this proposed method, proposed by the survey, is a fairer method of distribution than is now in effect?

Mr. Horsky: If you will permit me the 1/1000 of 1

per cent again, I will say yes.

The Court: You think it goes down to such infinitesi-

mal, small fraction of improvement?

Mr. Horsky: Your Honor, here is the problem. The basic problem as you cannot do anything fundamentally to improve the situation as long as you leave it under the control and with the domination of this group of people.

The Court: I know. Now, what your complaint is, as I take it, is that while in your breast you feel this is

an improvement, it is still not perfect.

Doesn't the decree recognize that perfection may lacking when it provides that we will try this out for I

think it is three years that it says, doesn't it?

Mr. Horsky: You are talking only about the Joel Dean Associates survey, your Honor. I am not talking [fol. 518] about that. I think that is all right, sure. That is an improvement. I am talking about the way that you get the raw material to feed into that system. No system of sampling is any good unless you have got good raw material to feed into it.

The Court: I suppose you are always going to have a certain amount, a certain percentage of human error, that

will come into it.

Mr. Horsky: That we can live with, your Honor. Let me tell you what our suggestions are, and I think that will illustrate better than I can by talking about the problems here what I think might be done.

The first suggestion, and the basic one, is that this be taken out of the hands of ASCAP and contracted out to an independent organization which will remove it imanediately from any control by the directors, or anybody else in ASCAP. And what ASCAP will get will be the results of this survey, which they can then feed into the sampling system and come out with the results.

The Court: You mean there should be sort of a super police agency constantly supervising the operations? Mr. Horsky: Not a police agency. Make a contract with someone to run the surveys for ASCAP and certify the results. It is perfectly feasible to do this.

The objection that has been made by the Society, by the dominant group in the Society, in negotiations with Justice is that it is too expensive. We would challenge that statement. We would believe that it was cheap. And in any event, we would like to know, in terms of actual dollars, how much more it would cost to see whether you could get more justice, and how much it would cost to get more justice than you have under the present system.

Now, this immediately relates, as you will see, to the first objection to the composition to the board of directors.

This is all part of the same problem.

But what you have, your Honor is the concession that the dominant group which stands accused of misusing its powers up to this point remaining in control of the system which feeds the results into this perfectly good sampling [fol. 520] system that the Joel Dean Associates is going to create for them, or has created for them, and it does not make any difference what Mr. Dean creates, or doesn'twhat Joel Dean Associates creates—it wouldn't do any good if the material that goes into it is perverted, and it can be perverted by this group.

Now, if it comes from an independent source, non-ASCAP personnel, non-ASCAP supervision, all that we get at ASCAP, in the Society, are the results-here are how many times these songs appeared on local stations, here are how

many times they appeared on networks—you eliminate the potential of damage and of wrengdoing which the dominant group has had—I wouldn't say proven against it, but which it has been alleged by the Department of Justice to have engaged in in the past, but which they leave completely within their power in the future under this proposed system.

That seems to me to be wrong, and that I would respectfully suggest to your Honor is the basis upon which this

should be rejected.

The Court: You see, what bothers me in this whole matter is this. Here I have a proposed consent decree sub[fol. 521] mitted to me purporting to be consented to by
ASCAP, but the men who are in ASCAP, or the companies
that are in ASCAP, are here voicing a word of protest
about what their duly appointed agent wants to accomplish.

Now, your association is a voluntary association, and there is nothing that compels anybody to remain in ASCAP that I see; nothing at all. Now then, I do not know that the Court should inject itself into trying to regulate the internal affairs of ASCAP. I do not know that the Court shouldn't say, if there are such a number appearing here—and I don't know what you men represent in point of view of being a substantial part of ASCAP—to the Attorney General, "You did the best you could, and you thought you were doing what you thought was right and just, and in line with your duty in this industry, but they don't agree with you, some of these people don't agree with you. Why go ahead and try this case?"

Is that what you men who object want to see accomplished

here?

Mr. Horsky: Yes, sir. I would like to have a hearing on this proposal.

[fol. 522] The Court: I can't have a hearing on this proposal.

Mr. Horsky: I know.

The Court: That means a trial of the basic issues of the complaint, or the amended complaint.

Mr. Horsky: It does not necessarily, your Honor.

The Court: You and Pdiffer on the law.

Mr. Horsky: With your permission, I will submit a memorandum on that.

I think you can have a hearing on an amendment to a consent decree.

The Court: You can have an amendment to a consent

decree where it is consented to.

Mr. Horsky: I said a hearing on an amendment to a consent decree.

The Court: I am giving you that. I cannot take testimony on a consent decree unless I have the consent of both the parties to a litigation, and that I so hold.

M. Horsky: Let me continue with my objections on this

proposal.

I have one more matter on this local survey which I think [fol. 523] would suggest to your Honor why this seems to us so important. As I say, the people whom I represent are particularly interested in the local survey, and they will be the ones who will suffer if the material which is fed into the Joel Dean Associates random sampling machinery is not fair material.

When the clerks that I have described listen to these tapes and put down what they can identify on the cards—and, incidentally, the brief notes that there is a standing offer from one of my clients to withdraw all objections if any clerk can recognize half the music on any tape, which has never been taken up by the Society—

The Court: If you put it in writing, Mr. Dean may take

you up on it right now.

Mr. Horsky: It is here in writing, your Honor.

The Court: I have a relative about my age, who every once in a while induces me to go to a family party. He cannot only identify the song being played by the orchestra, but can sing the words.

Mr. Horsky: He is not employed by ASCAP. I wish he

[fol. 524] were, your Honor. I wish he were.

The Court: He is not, and I do not think he would take it. I think he has a more lucrative business.

Mr. Horsky: Let me characterize it the way the Gov-

ernment characterizes it.

The Court: Did you want to say something, Mr. Dean?
Mr. Dean: I did not hear precisely what his offer was.
I would like to have it read back.

The Court: His offer was if any clerk could recognize

half the tunes played on any tape one of his clients will withdraw any objection he might make.

Mr. Horsky: It is on page 43 of my memorandum, Mr.

Dean.

Mr. Dean: The other client would not so withdraw, as I understand it.

Mr. Horsky: That is right.

Let me read what the Government says in its memorandum on page 4:

"The tapes are then sent to the ASCAP office in New York where they are played by a group of employees having no special musical qualifications, who [fol. 525] attempt to identify these songs and thus make a record of performances."

The hearings before the Congressional Committee revealed that there were 16,000 pieces of music which were not identified in the course of a year by the local survey, even on this 2 per cent sampling basis. The distortions this can produce are enormous, literally enormous.

As one illustration of the way in which the directors have powers to, if I may repeat what I said before, inflict economic reprisals, the Society gives to the directors a discretion, as I think Mr. O'Donnell recognized, in public domain music to determine a percentage of credits which public

domain arrangements could receive.

There is a vast amount of that kind of music published by a vast number of publishers, and a large number of writers, and the amount of credit which a publisher gets for that kind of work, which is played, depends on the extent to which the Society has chosen to regard it as containing new medlodic material, new lyrics, and the like.

This does give a tremendous amount of discretion, and it also creates tremendous difficulties in identifying the

[fol. 526] music on the local survey.

The other thing I would like to mention on the local survey is this. Once the clerk has listened to the tape and has determined as much as can be determined by her of the music that is played on it, the tape is erased. There is no possible way that one who objects can find out what

actually did happen in the survey. The Society does not keep any of the proofs, and, consequently, the appellant procedure, which is spelled out in this decree, does not really protect the people that I represent against errors, . deliberate or otherwise, that would occur in the sampling. process.

The Court: We will let you continue tomorrow morning at 10 o'clock. We will adjourn until 10 o'clock tomorrow

morning.

(Whereupon, at 4.10 p.m. Court adjourned to October 20, 1959, at 10.00 o'clock a. m.)

[fol. 527]

Civ. 13-95

UNITED STATES OF AMERICA

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.

> New York, October 20, 1959, 10 A.M.

Present:

Mr. O'Donnell, Mr. Bennett, Mr. Karsted, Mr. Wilson, Mr. Dean, Mr. Milman, Mr. Finkelstein, Mr. Pecora, Mr. Cutler, Mr. Horowitz, Mr. Terry, Mr. Finkelstein.

The Court: All right, Mr. Horsky. Mr. Horsky: Thank you, sir.

The Court: Continue. I would like to complete the hearings on this matter today. I set aside yesterday and today, and if it is necessary we will continue tomorrow afternoon. [fol. 528] However, it seems to me that two days of this will be about the limit of judicial endurance for oratory.

Mr. Horsky: I will try not to trespass on your time any

more.

The Court: No, it is my job. All right.

Mr. Horsky: I have one more part of this decree to which I would like to draw your Honor's attention. But, before I start on that, I should like to say that I have been advised after the Court rose yesterday that I have made an error in a statement of fact which I should like to correct for the record.

Mr. Dean informed me after the Court rose that the tapes which the tapes which the Society maintains of local broadcasts, that is, the monitoring that they do around the country, are preserved for two years. I had not stated that to your Honor in my statement.

I should like to comment that I don't know when this two-

year rule was instituted.

The Court: Maybe Mr. Dean will tell you now.

How long have they been kept for this two-year period?

Mr. Finkelstein: For at least three years, I think, your Honor.

Mr. Horsky: And I should also like to call to your atten[fol. 529] tion, your Honor, that a writer member of ASCAP gets his detailed statement of his earnings from
ASCAP a year after the earnings accrue. Specifically one
of the managers of one of the applicants for leave to intervene whom I represent is a writer and he received within
the past ten days his statement of his earnings from ASCAP for the period from October 1, 1957, to September 30,
1958.

The Court: I know. That was not declaring a bonus of a year end dividend. That is a part of doing business. What do you suggest be done there? Do you think it is feasible to have six months statements?

Mr. Horsky: If you would let me finish my point, sir.

The Court: I am sorry.

Mr. Horsky: I am pointing out that his statement that he received was for the period from October 1, 1957, to September 1958. That is a year ago. If he were to take the nine months which is permitted him by the proposed order within which to determine whether he should challenge that statement, he would find upon application to the Society that under the two-year rule of preserving tapes nine months of the tapes for the period with which his

statement was concerned would already have been de-[fol. 530] stroyed.

The Court: That seems to be easy of remedy.

Mr. Horsky: That's right.

The Court: If they can keep the tapes for two years without too much expense I suppose they can keep them for three years.

Mr. Horsky: That's right. They do not. That is my

point.

The Court: Is there any difficulty on that, Mr. Dean?

Mr. Dean: Not the slightest, your Honor.

The Court: You are willing to recommend that to your client?

Mr. Dean: We will recommend any procedure which gives every member of ASCAP full access to our records. The Court: It seems to me that maybe Mr. Horsky has made a suggestion that might in fairness be adopted. Instead of keeping them for two years, keep them for three years.

The Court: Do you find any fault with this yearly state-

ment?

[fol, 531] Mr. Horsky: No, sir. I simply want to-

The Court: I don't think it would be feasible in a business enterprise of this nature to get out these statements on a quarterly basis or half year basis.

Mr. Horsky: I am not suggesting that, I am simply

calling attention to the time factor.

The Court: Then I think your objection will be met if the Society keeps these recordings instead of two years, keeps them for three years, keeps them for one year after the date that the statement goes out.

Mr. Dean: That is quite agreeable, your Honor.

The Court: That would be better.

Mr. Horsky: One year after the period-

The Court: The statement goes out after the period. Mr. Horsky: The statement came out last week.

The Court: Then I would suggest to the Society that they keep these recordings for one year beginning after the statement is mailed out.

[fol. 532] Mr. Horsky: I think we are not quite meeting on this issue, your Honor.

The Court: I think I have given you more than you have asked for.

Mr. Horsky: As you phrase it, you have not, because the point that your Honor is overlooking is that the statement covered the period a year ago. The statement that was just received covers a period which ended 12½ months ago.

The Court: Yes. I am suggesting-

Mr. Horsky: Yes, sir, they keep them for a year after today, it won't cover any of the period that is involved in this statement.

The Court: Perhaps I am dense.

Mr. Dean: For the period for which the accounting is given to the member, which, let us say, is for the fiscal year ending September 30, 1958, they will go out the following July. We will keep them for a year after we mail the statement to the member.

The Court: That is exactly what I suggested. I think that gives you plenty of time, it gives even more time than three years.

Mr. Horsky: That is not involved in the proposed order.

[fol. 533] This is just a matter of detail.

The Court: I know, but while we are discussing this matter, if you bring out something that I think should receive attention I want to find out what the position of the Government and the Society is on it.

Mr. Horsky: I am very happy to have this concession by

the Society.

The Court. The Government has no objection to that?

Mr. O'Dornell: None at all, your Honor.

Mr. Horsky: Let me turn to the third part of the order, your Honor, to which we would like to call your attention and to which we believe you should not give your approval. This concerns III(F) of the order of the weighting rules and the weighting formula. The problem here needs to be distinguished, needs to be divided into two parts. There is no criticism on the part of the applicants to intervene, the applicants whom I represent, there is no objection by them to the power granted to the Society to distinguish in terms of the credit that shall be given for the playing of a member's work, between a work which is played as a feature

[fol. 534] performance and a work which is played as a theme or as a bridge or as background music and the like. In other words, we are quite agreeable and we make no challenge and I just want to put this to one side, to the theory which says that it is worth more in terms of performance credits to have a work performed as a feature than it is to have it performed as background music.

Whatever formula that is properly adopted for that purpose is perfectly all right with its. Our criticism is directed solely at the part of the order which provides that you may distinguish between members of the Society when you play their works in exactly the same way for exactly the same period of time and in exactly the same program and give one member of the Society more for his work than you do another member of the Society for his work, for identical performances, in identical circumstances, even on identical programs.

Now, under the present practice of the Society, not under the proposed order, under the present practice, this discrepancy is as high as 1000 to 1, that is not hyperbole, this is actual mathematics, one member of the Society [fol. 535] will receive for the playing of his work as background music 1000 times as much money as another member of the Society will receive for his work played in exactly the same way and exactly the same program

for the exactly same time as background music.

The Government properly objects to that. Because, as it turns out, this rule benefits the dominant members of the Society who own almost two-thirds of the works which

get the 1000 to 1 advantage.

Under the proposed order, it is provided that this advantage be cut down. We believe, your Honor, that it should be abolished and that every member of the Society should be treated equally in terms of the amount of credit which is received when his work is played. Let me try and explain the philosophy of this.

It is asserted that the reason why this discrepancy is proper is that certain works in the Society's catalog are better known, are more important, are older, they evoke more pleasant stimuli when they are heard on the radio or on the television and, therefore, they are entitled to more credit. There is no doubt that certain works in the [fol. 536] Society's catalog are worth more than other works. There are works that will earn a great deal of money. There are works that will earn a very small amount of money. There have been hits and there have

been not hits.

Of course, there is one absolute way in which these works may be valued and that is how many times do the licensees play them. If you have a hit tune and it is a persistent popular tune and will last for the full 56-year period of the copyright and have recurring stages of popularity, sure it will earn considerable money for its author and for its publisher, because it will be played over and over again. It will show up on the logs of the networks. It will show up on the logs of the local stations. It will earn

performance credits.

If you have a tune which is a fly-by-night, popular for two days and then ceases to be popular, it will earn a little bit and then it will not be heard any more. We believe that the test to be applied properly to the evaluation of works of music which are owned by members of the Society is the test which is properly applied in terms of their [fol. 537] actual acceptance by the addience, by the licensees, the people who deal with the Society for their business. In other words, we would suggest that rather than under the modified proposed order that the thousand to one be cut down to something less than that, that your Honor should not approve this because it still maintains a basic unfair distribution of the Society's revenues to the dominant members of the Society. They still own two-thirds of these tunes.

The Court: Of what tunes?

Mr. Horsky: Of the tunes that get the advantage. The Court: Of the tunes that have durability?.

Mr. Horsky: Of the tunes which are called in the proposed order the qualifying works. These are works that are permitted under the order to have an advantage now not of a thousand to one, as they have at the present, but if they are played as themes or bridge or cue music, which terms are defined in the order, they get an advantage of 10 to 1. If they are played as background music their ad-

wantage may go up under the proposed order even as [fol. 538] high as a hundred to one.

The Court: Hasn't that been a substantial improvement? In one case it has been reduced 100 per cent and in another case it has been reduced at least 10 per cent.

Mr. Horsky: It is not as bad as a thousand to one.

The Court: It is a considerable improvement, is it not? -... Mr. Horsky: It is an improvement.

The Court: Considerable improvement?

Mr. Horsky: Considerable is determined whether you

believe it has any justification at all.

The Court: Let me see if I understand your point, because I have read this and I think I do understand it, but I want to be sure.

In this group of songs which are given special treat-

Mr. Horsky: Qualifying works they are called.

The Court: Let us use which practical term you want.

Such a tune, for instance, as Tea For Two-

Mr. Horsky: I don't know if it was a qualified work. [fol. 539] The Court: I would imagine it would be. That is a song and a theme that I have heard, my children have heard and my grandchildren hear and still enjoy. Shouldn't that receive some special treatment as a qualifying tune by reason of its durability?

Mr. Horsky: Surely, your Honor-

The Court: It is like a staple in a store, it is staple merchandise. If you don't sell it one year, you sell it the next. People are always coming in and asking for it.

Mr. Horsky: Sure, you have to evaluate how much more

it should get but how much it is played.

The Court: I don't know. For instance, a storekeeper always has to have blue serge suits in his stock, yet he does not sell too many of them. But there are those of us who like to have at least one blue serge suit in our wardrobe when we can afford two suits. That is a staple. These songs are staples. They have durability. They are part of your stock in trade and without them you cannot conduct your business. I think this is a substantial better-[fol. 540] ment, admitting the ratio was far too large the Government has by its negotiations brought that down to within a reasonable range. Let us try this out.

I am not impressed with this objection, Mr. Horsky,

very frankly.

Mr. Horsky: Let me leave it with you and go on to the subsidiary objection which I have on the same point. I don't mean to say I am abandoning my position. I think you understand it and I have stated it as best I can.

The Court: You can attribute this just to the obstinancy

of the Court.

Mr. Horsky: I won't do that, but I am glad to have

your permission to do that.

How is a qualifying work defined? This definition is set out in the rules, the weighting rules and the weighting formula. The part of it which seems to me that cannot receive your Honor's attention properly is that in order to become a qualifying work you may rely on the records of ASCAP which have been as the Government charges and as I think everyone will admit inadequate and under the control of the very people who are here charged with [fol. 541] the conspiracy to run the affairs of the Society to their advantage and to the disadvantage of their competitors.

More specifically, it is possible for a work to become a qualifying work by having accumulated 20,000 performance credits, which are performance credits on ASCAP's books. These records are not reliable. They are records which have been put together for the benefit of the dominant publishers, and yet the proposed decree, the proposed order would perpetuate by allowing reference to those records, the unfair and improper advantage which these publishers have created for themselves under the present system of doing business, and which the Government has characterized as unfair to their competitors in their memo-

randum now before you.

It seems to me that it is an imposition on the Court to

say that it should approve-

The Court: Mr. Horsky, on this definition of qualifying works, as I read it, a work to be a qualifying work must need not only this test that you just pointed out but it must also meet the test of an accumulation of 2500 feature performance credits during the five latest available pre[fol. 542] ceding fiscal year surveys.

That means that since we are going to continue to operate under a new survey, that ultimately in the passage of time, with the help of the Lord, if this thing continues, we are going to have more and more of these eliminated and eliminated on the basis of a survey which will be under constant supervision of the Attorney General and perhaps of the Court. Ultimately these wrongs which you say exist will be corrected. It will take a little time to do it.

Mr. Horsky: That is not so, your Honor, I am sorry.

The Court: Let me hear why it isn't so?

[fol. 543] Mr. Horsky: Let us assume that there are two works now in existence, one owned by a dominant publisher which by this thousand to one advantage, which I have just mentioned—

The Court: Now we are down to a hundred to one.

Mr. Horsky: There is a work owned by a dominant publisher that has had by the thousand to one advantage a chance to accumulate 20,000 credits. There is a work owned by a non-dominant publisher, by one of my applicants, which because it has been accumulating credits at one thousandths of the rate has two thousand credits. Both of them are presently being played far in excess of the rate of 2,500 credits which was acquired during the preceding five years, there is no way that the work owned by my applicant will ever accumulate the position, will ever achieve the position owned by the work of the dominant publisher. That discrepancy is not going to be eliminated by the passage of time at all. That is the discrepancy I am suggesting to you. That is the discrepancy which I think should not receive your sanction. I believe I have made the point. I don't want to take more time than is necessary. But that basically is our objection to Section III of the order.

[fol. 544]. There are two or three other minor provisions. I say "minor" because I don't think they have the same magnitude as the one I have been discussing, which I would

like to call to your attention.

One of them is the provision with respect to foreign distribution. It has been the practice of the Society to distribute all foreign revenues on the basis of the data which it received from England, Canada and Sweden.

The Court: Let's come to that qualifying works business. Let me ask you this question. That is on page 3 of the weighting formula. Do you gentlemen have it?

Would ASCAP be agreeable to changing it so as to make it read "a work complying with one of the following

tests"? And then after I "or" and then II?

Mr. Dean: No, your Honor, because Mr. Horsky's presentation has very carefully left out the essential feature. of the definition. If you will look at I under (C) it is: The accumulation of 20,000 feature performance credits. Your Honor, the thousand to one ratio does not apply to feature . [fol. 545] performances. All through his presentation Mr. Horsky has very carefully left out that word. That is a very important distinction.

Mr. Horsky: Your Honor, may I make a reply to that?

The Court: Yes.

Mr. Hersky: None of the records of ASCAP prior to 1955 distinguish between feature performances and any other performances. There is no way to find out whether these 20,000 credits were earned as feature performance credits from ASCAP's records. That is not in disputé.

The Court: Is that a fact, Mr. Dean?

Mr. Dean: That is why you have subdivisions (B) and (C), your Honor. It was very carefully worked out with the government so that this could be established under (C) on page 3 of the weighting formula we have (b), that any work first performed before January 1, 1943, shall satisfy the requirements of subparagraph (A) one above. In the event such work has not accumulated 20,000 feature performance credits since such date, if the title of such work appears in the publication of Variety-

The Court: I see.

Mr. Dean: And (C) is the other paragraph.

[fol. 546]. The Court: All right. I see. Go ahead to the

next point.

Mr. Horsky: The next point, your Honor, deals with the distribution of foreign revenue. As I have said, the system that has been applied in the past was to distribute all foreign revenues on the basis of the actual results from England, Canada and Sweden. This operated very much to the advantage of the dominant publishers whose principal revenues would have been derived from the performance of English works and who, therefore, benefited by having German, Italian and other countries' revenues divided in the same way.

This is now changed mildly so that, if the revenue from a foreign country exceeds \$200,000, and if the reports are such from the foreign country that it can be allocated to the individual and the publisher by specific amounts, it will be so administered.

On the other hand, if it does not achieve \$200,000, it is not so distributed, which leads to this result: that if the revenues from the Italian performing society are-meticulously detailed as to who is entitled to how many dollars, but they total up to \$195,000, it can be distributed in the discretion of the dominant publishers who will remain in [fol. 547] control of the board "on the basis"—I am reading—"of the most reliable information ASCAP has as to foreign performances generally"; in other words, a pure, openended provision which gives them the power to allocate it to their own advantage. It is a provision which is an illustration of the situation which I mentioned to your Honor yesterday, of the discretion which is vested in these publishers.

I believe I am correct in saying that the reason the Swedish remittances are distributed is that Sweden has said that it won't contribute anything unless it is assured that they go to the proper people. It seems to me that it is incredible that the Society would not be willing to take money which is specified for a particular work, a particular composer, in the Italian receipts, for example, even if it is only 15 cents, and send it to the appropriate person in this country and not lump it all into a huge pot. It seems to me that this is a provision which should not have your sanction.

The Court: Well, unfortunately in our system of society we have to yield some of what we believe to be our individual rights for the benefit of the whole. That is part of our system of society and way of living. And so it must be in a society such as this, that in order to make the society work and function someone must at times give out [fol. 548] for the benefit of his fellow members what he,

according to the strict letter of the law, may be entitled to. It is a contribution that has to be made as a result of living · together .-

Here you have 6,400 people living together in this one

group.

Mr. Horsky: Your Honor, that would be much more persuasive if we did not have a situation in which you have a charge under the antitrust laws that the group which is going to divide this up has conspired to deprive competitors of their advantage in violation of the Act..

The Court: Even the clients on behalf of whom you

speak have been so charged.

Mr. Horsky: No, no. The Court: Oh, yes.

Mr. Horsky: No, I am sorry.

The Court: You are so charged by being members of

the Society.

Mr. Horsky: There are two separate conspiracies here, your Honor. I want to be sure that I make this point clear to you. There is a conspiracy with which we stand charged as well as the members represented by Mr. Dean. That is the conspiracy with respect to the licensees, the external [fol. 549] conspiracy, if I may so call it. Then there is the internal conspiracy of which we are the victims, not the conspirators.

The Court: In which you are what we used to call particeps criminis of your own choice, and you can withdraw

any time you want to.

Mr. Horsky: No, sir. The Court: All right.

Mr. Horsky: The other charge in the complaint and the other charge which is dealt with in the 1941 decree and in the 1950 decree and which is proposed to be dealt with in this decree is the charge that the dominant members of this Society have misused their position in the Society to advantage their competitive position over the other members of the Society. That is the charge with which we are . concerned today, and we are one among the other members of the Society.

[fol. 550] The Court: Mr. Dean—he is not impatient; he is very patient. Suppose we let him say what he has on his mind.

Mr. Dean: I did not know, your Honor, whether or not you wanted me to-

The Court: I think at times it is all right. You are not interrupting unduly.

Mr. Dean: I can break up my overall presentation and

answer this very briefly now.

The Court: It might be better, if it is going to be a lengthy dissertation, just to keep making notes on your pad and hold yourself in restraint.

Mr. Dean: I didn't know whether you wanted me to re-

spond after each point.

The Court: It would be preferable if you would wait unless I, myself, interrupt and ask you a question.

Mr. Dean: Very well, your Honor. Thank you.

The Court: Doesn't the proposed decree now breaden the basis of the distribution far more than at present?

Mr. Horsky: I would not say "far more," your Honor.

[fol. 551] If broadens it.

The Court: More. In other words, "far more" is really a question of opinion. But we do agree that the proposed decree contains a method for a broader distribution than we presently have.

Mr. Horsky: Yes.

The Court: And to that extent it is an improvement, is it not?

Mr. Horsky: Well, when you say "improvement," your Honor, you suggest to me that we should take this up step by step and look at it without looking at the overall effect.

On the question of whether this is an improvement, I should like to say that I think it is on the whole a distinct step backwards rather than an improvement. Our understanding of the nature of this proceeding before you, your Honor, today is that you are to examine this proposed order to see whether it advances the purposes of the antitrust laws, whether it provides for carrying out the Sherman Act and the primary purpose of this consent decree which is before us, and whether it has cured the evils which the Government has pointed out to you.

[fol. 552] The Court: I agree with everything up to the end. I cannot say now as to whether or not this decree as it is now submitted to me is going to produce the maximum and the optimum result. I don't know. All I can say and all I am inquiring about is does this proposed decree improve the situation that presently exists? Is it designed to carry out to a greater extent the objectives of the suit than the present decree? Is there a fair expectation that this will work out all right? And are means provided whereby, in respect to which it does not work out all right, the Attorney General may apply to the Court for further action?

That is my inquiry to you as I see it, and I agree with

everything you said up to the last phrase.

Mr. Horsky: Well, I think that I would agree with everything you have said except that I would emphasize one factor which I believe you did not mention. This decree which is being amended is your decree, is the decree of this Court. You have a certain amount of responsibility to see to it that it is carried out properly. I don't mean you in the sense of you, personally.

[fol. 553] The Court: That is something that perhaps you missed. It is my decree and it is not my decree. It becomes the decree of the Court. When I say mine I don't

mean to speak in personal tones.

Mr. Horsky: I didn't either, your Honor. I meant this

Court.

The Court: It is the decree of the Court once the Court's signature is placed upon it. But the Court's power to fashion this decree is by no means as broad as the Court would possess had the matter come before the Court after litigation and after judgment rendered by the Court.

This is a consent decree, and I either have to take it as the parties agree or reject it, and I have great difficulty in rejecting a proposed decree which I feel improves the

present existing condition.

Mr. Horsky: I think, your Honor, that I would say, if you feel that you have lent judicial sanction to the continuation of a system which has been demonstrated before you to be bad, that you are doing a disservice to the decree of this Court and not a service to it.

[fol. 554] Let me read a sentence to you—

The Court: That would mean then, Mr. Horsky, to follow it out as I pointed out to you yesterday, if I rejected this decree we would have to continue to operate under the existing decree which contains manifest injustices and inequities, and the Antitrust Division would then have to make a decision:

Shall we continue to operate under this decree which we know does not fully accomplish the purposes of our suit, or shall we depart from this consent decree and litigate this matter?

Would you have this whole matter litigated?

Mr. Horsky: No, sir. I think our fundamental disagreement is on what the state of the law is, and on that I would ask again that I be permitted to file with you a memorandum. But, briefly stated, I would believe that, if you rejected this decree, the Department of Justice would have no alternative but to come before your Honor with a decree which it believed did adequately meet the purposes of the antitrust laws and the purposes of the 1950 decree and ask that you approve those amendments to this decree. [fol. 555] The Court: I could not approve those amendments to this decree—

Mr. Horsky: Without a hearing.

The Court: —without a trial—without a trial, a trial—and that trial and the filing of that application would be equivalent to the consent by the Attorney General to vacate the 1940 consent decree and the amendment of 1950 and the whole matter would be without restraint of any kind until I determine.

Mr. Horsky: That is where we disagree on the law.

The Court: You don't have to prepare a memorandum on that. I will be persistent in what you believe to be my error. I have examined that question myself at great length.

Mr. Horsky: Very well. Let me call your attention to one or two other items, then, of the order which I think your Honor should know about.

Let me call your attention to a provision in the order which purports to put a 100 vote limitation on the vote of any member of the Society. This is cited by the Govern-[fol. 556] ment as one of the restraints which is put upon the ruling clique and as a step forward. Let me find the specific provision. This is on page 9 of the proposed order.

"The votes of each member shall be calculated in accordance with the following formula subject to the limitation that no member shall have more than a hundred votes."

That I would say with due deference is a pure phony. It does not include the votes of affiliates, and all that it requires is that people who are members of the dominant group allocate their copyrights properly among their affiliated members and they will not have to worry about the hundred vote limitation.

[fol. 557] Let me suggest that I am not being unduly bold about my statement by reading to you what the counsel for the defendant himself says will happen under the new decree. This is the speech which has been filed with your Honor by Mr. Dean, and I am reading from page 36.

The Court: Which speech? The one out on the West

Coast?

Mr. Horsky: No, sir, your Honor. The one in New York on August 27, 1959.

The Court: All right. I have it.

Mr. Horsky: Page 36 at the bottom of the page, your Honor. Referring to the dominant group that I have been talking about, he says:

"The 12 publisher members of the board of directors, including affiliated publishers, would initially have about 1505 out of a total of 4,908 publisher votes. This is a substantial reduction."

The next sentence.

The Court: This is a substantial reduction from 56 per cent of the votes.

Mr. Horsky: That is not the point I am talking to now. The next sentence, the hundred vote limitation, is what I am now addressing myself to:

[fol. 558] "Under the formula of the 12 publisher members of the board of directors, including affiliated companies, one publisher member of the board of directors will have 424 votes, one would have 393 votes, one would have 254 votes," etcetera.

The hundred vote limitation is a sham. It is a perfect illustration of the kind of a decree which this is. It purports to be something and it really isn't anything. It purports to improve the situation. It leaves the situation just as it was.

The government says in its memorandum, and I am quoting from page 24 to you, "The vice of the system is that it gives these members in ASCAP who receive the largest share of ASCAP's revenues the power to elect the directors of the Society who in turn have the power to establish rules governing the Society's system of distribution which in turn determines which members shall receive the largest share of the Society's income." That is what the government says is the vice of the system. It remains the system under the proposed order. The dominant group still has control of the Society, and the vice which is pointed out in that memorandum has not been changed.

I think, your Honor, that I might make one or two general [fol. 559] observations and then I will close. I think I have

trespassed enough on your time.

First I would like to comment very briefly on the suggestion made by the government that, if a system were devised that took the control of the Society away from this dominant group, they would resign; they would get out. There are two things that might be said about it. The first one is that one of them tried it in 1939 and stayed out for a year and came back. It was not feasible. But economically at the present time it clearly is not feasible.

Of course each tune has at least two and perhaps three people interested: The publisher, the composer and the author. If the publisher should leave, the largest publisher, the authors and the composers presumably might not be persuaded to go along with them. If any tune remains in the Society, the people who leave cannot license it to any-

one else. They cannot use it in any other licensing society. If they do, they lose all the revenue that they would get from the Society on the tune even though it is earning revenue in ASCAP. And under ASCAP's by-laws, which are not-changed by this decree, if they should try to license it to another society, not only they but the publishers and [fol. 560] composers and authors, everybody connected with the Society, loses all revenue from that tune. I therefore say I don't think this is economically a reasonable threat.

Thirdly, I am not at all sure and my clients are not persuaded that, if the dominant group were to leave the Society, they would be worse off than they are now. The way the revenues have been allocated in the past has been so discriminatory and so unfair that it is impossible to tell under the present situation what the financial benefits or disadvantages would be if the group that has been mulcting the Society in the past should actually leave it.

The other thing that has been suggested is: Why don't we pull out if we don't like it? It is just as economically unfeasible for us to pull out as it is for the dominant group to pull out, for the same reason. But more than that, the clients that I represent, and I want to be sure that you understand this, believe in ASCAP, believe there must be a performing rights society. All they want is a society which is properly run, which is run for the benefit of all of its members, which is not dominated by a group which has stood in the past accused of misusing the Society for its own advantages.

[fol. 561.] They want it open, democratic, as the 1950 decree contemplates, a democratically operated society, and the suggestions we have made for a proper modified order are designed to bring that about.

Thank you, your Honor.

A

The Court: I promised to hear Mr. Schaeffer because he comes from Chicago, and after Mr. Schaeffer I think Mr. Fishbein and then Mr. Rothstein, Mr. Zissu, Mr. Niles, Mr. Kaufman, Mr. Battle and Mr. Bradford. All right, sir.

Mr. Redd Evans: Your Honor, were you reading the

names of the people who will speak?

The Court: I was reading the names of those who applied yesterday for permission to be heard.

Mr. Evans: There were two names included there, sir. I came late, and the court stenographer took my name afterwards. My name is Redd Evans.

The Court: You did not make an application to me to be

heard.

Mr. Evans: We gave our names to the clerk yesterday, sir. We came up here late.

The Court: You did not make an application to me.

Mr. Evans: It was impossible to interrupt, sir.

[fol. 562] The Court: Was that because you came late?

Mr. Evans: Yes, sir. The Court: All right.

Mr. Evans: Thank you, sir. Will I be allowed to appear, sir?

The Court: I am going to see. Your name is what?

Mr. Evans: Redd Evans, R-e-d-d E-v-a-n-s. The Court: And you represent whom?

Mr. Evans: I represent a group of small writers and small publishers.

The Court: All right. I will hear you at the end.

Mr. Freedman: Your Honor, the other name that was given with Mr. Evans' name was Guy Freedman, F-r-e-e-d-m-a-n.

The Court: All right, gentlemen, I am not going to have this go on interminably but within reason. I think 15 minutes ought to be sufficient for each one, not more than 15 minutes. I will give you a little longer.

Mr. Dean: If I am not mistaken, Mr. Evans' company is the Jefferson Music Company, Inc., represented by Mr. Horsky, At least their research

Horsky. At least their name is signed to the papers. [fol. 563] The Court: Is that a fact, Mr. Evans!

Mr. Evans: Your Honor, may I explain this?

The Court: No, we are not going to interrupt now. When your time comes to be heard, you can explain it. I am not going to hear the lawyer and then the client, too.

Mr. Evans: May I be given the status-

The Court: Not at this time. I will hear you later on, and I am not squelching you. I will hear you later on, sir. All right, Mr. Schaeffer.

STATEMENT OF MR. SCHAEFFER

Mr. Schaeffer: If your Honor please, may I first thank the Court for the permission to speak in this District Court. Having been admitted, of course, in the State of Illinois,

the courtesy extended me to speak-

The Court: This is a court of the United States, and in my book, if you are a member of the Bar any place in the country, you are entitled to come in here and address the Court. There are some who differ with me, but that is my philosophy. So I am happy to have you here.

Mr. Schaeffer: Thanks very much.

I represent principally the publishers in the City of [fol. 564] Chicago, some 15 publishers altogether. They have become alarmed because of the fact that, without sufficient notice at least, the ABC network has been dropped, that is, the radio network, from the logging of ASCAP.

The Court: Is that your only objection?

Mr. Schaeffer: That is the objection to which I am going to address myself.

The Court: All right, sir.

Mr. Schaeffer: The first notice that we were given, of course, was that a speech was made by Mr. Dean saying that the logging would continue on the radio networks of ABC, NBC and CBS but that on the radio networks of NBC and CBS they would be the only ones to be logged. That would mean then that ABC would be taken on a sampling basis.

When I attempted to communicate with ASCAP to find out what the distinction was I received no response. So that I proceeded to do the only thing that was possible, to take it up with the Department of Justice, and in order to be correct in my postion I discussed it not only with the antitrust attorneys in Washington but also in New York

here.

[fol. 565] They of course would not furnish me any information, they said that certain information was restricted, and then I discovered that ASCAP had more classified information than the Government did. There was top information which was not disclosed.

The Court: I have always understood, and I know the Government has the right of access to the records of

ASCAP, that there is nothing confidential about it. In fact, I have had a number of interested parties communicate with me, I think one particularly, Mr. Chevette—

Mr. Cheyette: That's correct.

The Court: And ASCAP as a result of my suggestion, not direction, suggestion, made available to his inspection all its records. ASCAP's records are not so confidential that you representing a member cannot go to them.

Mr. Cheyette: With leave, may I say what was supplied

to me was a letter from ASCAP's counsel.

The Court: You got everything you wanted, didn't you? You didn't come back to me.

. Mr. Cheyette: That's correct, your Honor.

[fol. 566] The Court: Therefore I assume you got what

you wanted because my door was open to you.

Mr. Schaeffer: My position was a little different, because I addressed myself to the general counsel of ASCAP and was informed that this was a confidential information. I was informed by Mr. Dean yesterday that the contracts between the licensees are privileged, as it were, and part of the contract says that they are not to disclose any information because of competitive reasons.

The Court: You might want to have looked at certain parts which were by agreement to be kept confidential. May I say to you that all of these contracts with these radio stations came about as/a result of negotiation and a

hearing, fixing the royalty rates.

Am I correct, Mr. Finkelstein? Mr. Finkelstein: That is correct.

Mr. Schaeffer: As an attorney I feel, as an officer of the court, that these figures could be disclosed to me so that I could make a satisfactory report to my clients at least that the basis on which they are saying now that this network is being dropped is because there isn't satisfient [fol. 567] revenue. But the statement is made that it is making less than some of the independent stations. However, in order to satisfy as many members as we have in ASCAP, if they are represented by counsel and counsel has informed—

The Court: If that is your only point, I think this was touched on by Mr. O'Donnell when he explained why this is

being done. However, I will permit Mr. Dean at this time to just make a brief statement which may satisfy you.

Mr. Schaeffer: Pardon me, your Honor, Mr. Dean did make a statement in the beginning that the logging would continue on the ABC radio but only for the purposes of sampling, as it were, to find out if there were any unidentified numbers. That is always a big problem. The only network that we have out of Chicago is the Breakfast Club which has been on for 26 years, and has an hour every day, five days across the board.

The Court: Which club?

Mr. Schaeffer: Breakfast Club. It was on from 8 to 9 and now it is on from 9 to 10.

The Court: In New York we have our breakfast a good deal earlier than that. In fact, we have it every day an

[fol. 568] hour earlier than you.

Mr. Schaeffer: You become accustomed to it, as I have. The thing that disturbed them, the purpose of the whole proceeding, as I understand it, was to encourage small business to take care of the small individuals who in themselves have not great catalogs, and who are situated not in a locality such as New York or Los Angeles, where most of the networks send out their programs. Here we are limited to one chain broadcast.

In one fell swoop we are wiped out, as it were, as far as the daily logging. What the sampling will bring, I do not know.

I do say this, your Honor, I have spoken to the attorneys for the Antitrust Division. I don't believe they are in a conspiracy with ASCAP. I think they are trying to do the very best they can. I think that they have produced a beginning, as it were, and that I cannot say that I would be remiss to see this thing put into operation. The Court indicated that the time which was set forth for this thing to begin was a year or so. I agree with the Court it should start sooner than that, so we can find out and we can determine what the result is going to be.

[fol. 569] I have been assured by the Antitrust Division

that they are going to follow this line.

The Court: I will say this, Mr. Schaeffer, to allay any fears you might have, that my personal observation of the

functioning of the antitrust law has sheen in every way eminently satisfied. I think they are manned by a very competent staff, very able and industrious staff, and a devoted staff. The head of the Antitrust Division of the Attorney General's office is a really dedicated man of exceptional ability, and he is doing a splendid job and has done a splendid job.

Mr. Schaeffer: He was very prompt in responding to my communications, and I have found my association with the Department has been one in which they are seeking information as well as I. I don't feel that we are going to be harmed to the extent of where those that are now in a position to take everything that they can will continue to do so. I hope with the aid of the Antitrust Division and with the order that will be entered here that these remedies or e improvements can be made.

fol. 570] Thank you very much, your Honor.

The Court: Thank you very much.

Mr. Chevette, Mr. Horsky spoke for you?

Mr. Chevette: Yes.

The Court: Mr. Fishbein.

Do you want to speak a few moments?

Mr. Fishbein: It will be more than a few moments. The Court: I did not mean to be too facctious.

[fol. 571] STATEMENT BY MR. FISHBEIN

Mr. Fishbein: I represent five publisher members of ASCAP. The applicants I represent respectfully submit that the provisions of Section IV of the proposed order, which relate to the manner in which the ASCAP board of directors shall be plected, are imadequate to achieve the antitrust purposes of this suit.

The Court: Is that the only provision that you object

Mr. Fishbein: I would have to come to the end of my memorandum by saying that I will speak only to the provisions contained in Section IV of the proposed order. However, it is not to be implied therefrom that the applicants approve all other provisions of the proposed order. I am not going to speak with respect to the other provisions except to say this, your Honor, that I agree with . Mr. Horsky that the control of complying data for survey use must be placed in the hands of an independent agency as distinguished from the present board of directors.

The second point that I do not want to dwell upon is that I believe ASCAP is a public institution and all the records of ASCAP should be published for public use.

The Court: You don't mean to go that far, do you? [fol. 572] Mr. Fishbein: On that point, I will, your Honor. There isn't any reason why the public should not know how much money ASCAP collects each year and who feceives that money.

The Court: I know, but that is a limitation to your statement. For instance, ASCAP has the right to go in

and look at the books of its various subscribers.

Mr. Fishbein: I wouldn't go that far.

The Court: I knew you wouldn't.

Mr. Fishbein: I wasn't prepared to speak on that point,

your Honor.

The Court: That wouldn't be right, to let ASCAP make public the records of its customers which may get into the hands of a competitor. All right, as long as we understand each other. We have to be careful as lawyers when we make statements that we do not make them too broad and too recklessly broad.

. Mr. Fishbein: I appreciate the advice, your Honor.

Let me continue with Section IV. My clients further contend that Section IV of the proposed order does not insure a democratic administration of the affairs of ASCAP as expressed in Section XIII of the March 14, 1950, amended final judgment. Section IV does not as confol. 573] templated by the said Section XIII give true representation on the board of directors to members with different participations in ASCAP's revenue distributions. The election of members with lesser participation in ASCAP's revenue distributions continues to remain dependent upon the weighted votes of the few members having large participation in ASCAP's revenue distributions. For all intents and purposes, those few members will continue to control the board by electing themselves and their designees, who must serve beholden to them.

Your Honor may ask me, what do my clients suggest in lieu of the said provisions of Section IV. I am prepared to answer that. In order to accomplish the antitrust purposes of the suit, any further amended final judgment that may be approved and entered herein, should provide, substantially, for three things:

1. For the purpose of electing the 12 publisher members of the board of directors, the publisher members of the Society shall be divided into an appropriate and specified number of classes; each of said classes shall consist of publisher members whose current performance credits (or revenues, as the case may be) received in the latest available fiscal survey year preceding it each election, shall within certain designated maximum and minimum limits [fol. 574] of said respective class; and each of said classes shall nominate and elect a specified number of directors (not necessarily the same) from within its own class; totaling 12 directors in all. And parenthetically I may add a similar provision, with a suitable definition of classes, hall be made for the purpose of electing the 12 writer members of the board of directors.

Now, class voting is a well established procedure and often used in organizations to give representation to various classes. ASCAP itself provides for its writer members as a class to elect 12 directors and for its publishers as a class to elect 12 directors. Class voting as proposed truly gives representation to members with different participations as expressed in the 1950 final amended judgment. Directors elected from lower classes no longer would be dependent upon the votes of the few members having large participations in ASCAP's revenues. Directors elected from one class would not and need not be beholden to members of other classes for continuation in office. Each class would nominate and elect the best qualified members in its class. A truly democratic representative and independent group of directors would result from class voting as proposed.

[fol. 575] Now, the government recognizes the need for democratization for the board, but limits any opportunity for more independent and greater minority representation

on the board to the restrictive and workable cumulative provisions of subsections (E) of Section IV of the proposed order.

My clients say, "Why stop there? Why not now for the first time really insure a democratic administration of the affairs of ASCAP by establishing the principle of class voting?"

After all, your Honor must remember that the small publisher and writer members are just as concerned about the welfare of ASCAP as the few publisher and writer members having large participation in its revenues.

For example, let us assume that four classes would be an appropriate number of classes for publishers. Let us further assume that that class number one would consist of publishers whose current performance credits in the previous fiscal survey year exceeded one million performing credits. Let us assume the second class consisted of 500,000 to a million performance credits; and that the third class from 200,000 to 500,000 performance credits; and that the fourth class had below 200,000 performance credits

[fol. 576] We concede that those in class one make a greater contribution to ASCAP than those in the lower classes. However, if you were to allow one to elect a minimum of 9 directors of the total of 12, and the three lower classes one each, that certainly would not accomplish the antitrust purposes of this suit. However, there is a middle ground somewhere, and we do not say that each class should elect three directors. Why doesn't the government and ASCAP go back and reopen this proceeding and find that middle ground that will make a truly democratic administration of the affairs of ASCAP as contemplated by two prior proposed consent decrees, two of which resulted in decrees, now to the third now seeking to be made a consent decree.

My second point is that in addition to the 12 writer members and the 12 publisher members of the board of directors, there shall be two public members of the board; one public member shall act as a writer member director and one shall act as a publisher member director; the public members and their successors shall be designated at or before each election of the directors of the Society by the then Chief Judge of the United States District Court for the Southern District of New York; and ASCAP shall provide for the payment of reasonable compensation

to such public directors.

[fol. 577] Now, ASCAP is more or less a quasi public society. I believe Mr. Dean in his remarks conceded that. Admission to membership is compulsory. The use of music controlled by ASCAP is for the benefit of the general public. The public interest will best be served by the addition of public members to the board of directors. Only public members of the board would be free of the evil of dealing with themselves when voting for or against various proposals for the distribution of ASCAP's revenues among its members. Only public members would be free of self-interest and self-dealing, thereby enabling such public members to truly represent and protect the interests of all members of the Society.

. My third point that we propose is that there shall not be eligible for election to the board of directors any representative from a music publishing company or business, either directly or indirectly controlled by a user of music.

A representative of a music publishing company, controlled by a user of music should not be permitted to serve on the board of directors, since such a director would be [fol. 578] acting for conflicting interests. The provisions of the 1950 final amended judgment, Section V(C)(5) and Section X disqualify members of the board from negotiating a license where the members have any pecuniary interest directly or indirectly in any motion picture producer or other prospective licensees, and we believe those provisions are now negative and wholly inadequate. They have a utlived their usefulness.

ASCAP n embers are in competition with each other and no member must use the Society to obtain unfair adventures are about the society to obtain unfair adventures are also society to obtain unfair adventure and the society to obtain unfair adventures are also society and also society to obtain unfair adventure are also society and also society are also society as a society of the society and also society are also society and also society are also society and also society are also society as a society and also society are also society and also society are also society as a society and also society are also society as a society and also society are also society as a society and also society are also society as a society and also society are also society as a society and also society are also society as a society and also society are also society as a society and also society are also society as a society and also society are also society as a society and also society are also society as a society and also society are also society as a society and also society are also society as a society and also society are also society as a society and also society are also society as a society and also society a

vantage over the others.

All directors must be concerned solely with the welfare of ASCAP and seek to obtain the largest possible revenue for the use of its repertoire. More and more users of music have established and acquired and are continuing to establish and acquire music publishing companies. Such

music publishing companies are much more concerned with furthering the business interests of their parent user companies than with the publication and exploitation of songs for general public use. It is not difficult to envision [fol. 579] for the near future and the very near future an ASCAP board controlled by and replete with representatives of music publishing companies either directly or indirectly owned or controlled by users of music.

Historically, your Honor, prior to March 4, 1941, the Articles of Association of ASCAP provided that no copartnership, firm, association or corporation shall have more than one vote or representative in the Society, and that the directors shall be elected at each annual meeting of the board of directors by a two-thirds vote of the entire board.

The first consent decree of March 4, 1941 provided that the Society shall elect the members of the board of directors by a membership vote in which all author, composer and publisher members shall have the right to vote for their respective representatives to serve on the board of directors, and that due weight may be given to the classification of the member within the Society in determining

the number of votes each member may cast for the election

of directors.

As a consequence of the 1941 consent decree, the first [fol. 580] one, the Articles of Association of ASCAP were amended so that one vote per member was replaced by basing voting rights on the amount of revenue received by the member in the previous calendar year. That is, \$20, per writer vote and \$500 per publisher vote. Although the members now elected the board, the antitrust purposes of the suit was not accomplished, inasmuch as the few members having large participation in ASCAP's revenue distributions, awarded themselves sufficient votes, under the weighted voting system devised by them, to reelect themselves and their designees.

In other words, despite the 1941 consent decree, the board continued to be a self-perpetuating one and the same few members continued to hold the power to elect

all board members.

The Court: Mr. Fishbein, may I, without being offensive, but just as a matter of self-protection, show you as Exhibit 1 the original of your brief which you are now reading, and show you my underscoring of it to indicate to you that I have myself read each word that you put in your brief and which you are now repeating.

[fol. 581]. Mr. Fishbein: I am repeating it because your Honor said you wanted a town meeting of the air, and there are many, many members here who would like to

hear what I have written.

[fol. 582] The Court: I want you to see that I have read it and you can go through each page and see my underscoring.

Mr. Fishbein: I do hope you found it interesting.

The Court: I found it interesting because it presented

your point of view, and your clients' point of view.

Mr. Fishbein: I will break away for just a moment, because I have listened with great interest to the colloquy between your Honor and the attorneys that preceded me. I have gained the impression that you have an "either or else" position in this case.

The Court: I think I have heard enough from you. You

may sit down.

Mr. Fishbein: You are not permitting me-

The Court: I am not here to listen to your gratuitous remarks.

Mr. Fishbein: I beg your forgiveness, your Honor, I did not mean-

The Court: I am not here to accept comments by counsel.

Mr. Fishbein: Would your Honor permit me to explain
the last remark?

[fol. 583] The Court: Suppose I say I prefer to erase it from my mind. Proceed now.

Mr. Fishbein: The point I was going to make, your

The Court: I have forgotten it.

Mr. Fishbein: I did not mean it that way, your Honor.

The Court: I have forgotten it. Proceed.

Mr. Fishbein: Although the members now elected the board, the antitrust purpose of the trust was not accomplished, inasmuch as the few members having large par-

tricipation in ASCAP's revenue distributions, awarded themselves sufficient votes, under the weighted voting system devised by them, to reelect themselves and their designees. Despite the 1941 consent decree, the board continued to be a self-perpetuating one and the same few members continued to hold the power to elect all board members. Apparently, the government did not anticipate the result of the weighted vote.

Despite a nine-year history of absolute control of the board by the few members having large participation in ASCAP's revenue distributions, the final amended judgment of March 14, 1950, again provided that due weight may be given to the classification of the member within [fol. 584] the Society in determining the number of votes each member may cast for the election of directors.

However, the 1950 final amended judgment did recognize that ASCAP's members are in competition with each other and that one of the antitrust purposes of the suit was to make it impossible for certain members to use the Society to obtain fair advantage over their competitors. Thus, it did seek to insure a democratic administration of the affairs of ASCAP and it did provide that the board of directors thall, as far as practicable, give representation to writer members and publisher members with different participations in ASCAP's revenue distributions.

Again, despite the 1950 final amended judgment, the same few members having large participation in ASCAP's revenue distributions continued to maintain sufficient votes, under the weighted voting system, to reelect themselves. In their discretion, they nominated and elected certain designees with different participation in ASCAP's revenue distributions. Needless to say, such designees could not be elected to the board without the weighted votes of those few members, and obviously had to serve beholden to them. Again, as with two prior decrees, the antitrust purpose of the suit was not accomplished.

[fol. 585] Despite a further nine-year history of absolute control of the board by the few members having large participation in ASCAP's revenue distributions, and it is conceded it was less than one per cent of the publisher members and less than five per cent of the writer members,

Section IV of the proposed order does not, and will not, correct the conditions that exist. The same few members will continue to control the board, in spite of the government's desire to limit the extent to which ASCAP may weight the votes of its members.

Could I call for a short recess, your Honor?

The Court: The only point I make is that I have read this brief of yours and I have marked it. I want you to see it with your own eyes. I read every word of this brief. You and I are not children. I am entitled by the reason of the office I hold, the office is entitled to respect. I know you did not intend to offend and I am forgetting it. I don't want to disturb you. We will give you a ten-minute recess and then counsel will resume.

(Recess taken.)

The Court: You may proceed, Mr. Fishbein. Take your time.

[fol. 586] Mr. Fishbein: I would like to conclude my remarks by just pointing out that after a further nine-year history of absolute control of the board by the new members, dominant members, Section IV of the proposed order again does not, and will not, correct the conditions that exist.

I say that the same few members will continue to control the board, in spite of the government's desire to limit the extent to which ASCAP may weight the votes of its members.

I say that the illusory provisions of Section IV will not change the complexion or character of the board.

I raise the question: What difference does it really make to those same few members if the votes are weighted on the basis of curre. * performance credits rather than revenue received? Which, incidentally, is one of the changes made in the proposed consent order.

Is not self-evident that a lot of revenue means a lot of performance credits? Of what significance is the 100-vote maximum and the 10 per cent limitation set out in subsection (C) if those same few members will continue to maintain sufficient votes to elect themselves and their designees? What good does it do to provide for the nomination [fol. 587] of a member of the board by 25 or more members,

if the nominee cannot be elected without the weighted votes of those same few members?

Does subsection (E), which provides for the election of a director by a group of publisher members entitled to cast one-twelfth of the available votes, really accomplish anything? How will a smaller publisher member know the total available votes preceding an election? Or how many votes other smaller publishers possess so as to enable him to attempt to form a group comprising the necessary one-twelfth?

Assuming, without conceding, that such a group of competing, smaller publishers could be formed and could agree on the one to be elected a director, is it not quite apparent that a second and third group could not be formed to elect a second and a third director? If the antitrust purpose of the suit is to be accomplished and if there is to be a democratic administration of the affairs of ASCAP, we respectfully submit that the proposals made by us be incorporated in any new decree.

The Court: Mr. Fishbein, I would like you to do me a favor, to show you I personally like you very much, and I do. You are a very honorable and outstanding member of the Bar for many years. I received this communication [fol. 588] and perhaps you will read it, will you, so we may have it on the record. You are not necessarily subscribing to its contents by reading it, but the attorney who left it here has gone.

[fol. 589] Mr. Fishbein: (Reading:)

"Your Honor, I am Vincent Lopez and I wish to thank you for affording me an opportunity to address

this Court on this most important matter.

"I have rarely appeared before a Court and have rarely voiced my objections and indignation against the inequities that arise during one's lifetime. I have pursued a path of least resistance due to my many musical engagements and time consuming business affairs. However, at this moment I must speak out and defend the rights of the American composers who have enriched the culture and life of our country. I am here to voice my opposition to the proposed modification of the ASCAP decree which is before this Court.

"I have been advised by my attorney that there are injustices in the new plan for modification under the heading 'The Survey'. I will not go into this phase, your Honor, in order to emphasize the greater injustice in Section 3 under the heading 'Distribution to the Writers'.

"The proposed modification would operate to con-[fol. 590] fiscate from the writer members of ASCAP, as well as from the their widows and orphans the revenue and security which they contracted for and to which they are entitled by reason of their creative genius. I am opposed to such confiscation and I urge this Court to refrain from putting its seal of approval

on such an outrage.

"I am unfamiliar with the technical and legal ramifications of the proposed modification and as a layman and musician I consulted with my attorney who informed me that under the distribution plan presently in operation there was a graduated and slow diminution of receipts from ASCAP to a writer so that the writer or his estate could reasonably expect to receive revenues for the past performance or availability of his works over a thirty year period. Under the planpresently proposed the writer or his estate, and I again refer to his widow and orphans, would receive revenue for only three or four years and then be wiped out completely.

"The Department of Justice is asking this Court [fol. 591] and your Honor specifically to give judicial approval and sanction to this scheme to deprive the average ASCAP member of the revenues and security

which are due him.

"After all most of the older writers sweat our years of low remuneration and have had a good percentage of their current performance money taken away when they were the most productive. This for the consideration of a later cushion. To take this away in a few short years is ethically wrong and would be a tragedy to those who have given up other means of making money in years gone by, banking on later security.

"Let the Current Performance Election remain for those new writers to choose if they wish, but, in the name of all that is fair don't take away the security of the other members who justly depend on the original premise of ASCAP—to provide some security for the long pull.

"I am very happy and proud to be a member of ASCAP but I respectfully urge that this decree be rejected by your Honor with the indignation it justly

[fol. 592] merits.

"I thank the Court for this opportunity to speak out against this injustice and inequity."

That concludes the written statement, your Honor. I, too, thank the Court for the courtesies extended.

The Court: Thank you for reading it for us 'Ir. Fishbein.

Mr. Zissu, would you now proceed.

Mr. Zissu: My remarks will be very brief, your Honor. The Court: Mr. Rothstein, you are right, I skipped you

The Court: Mr. Rothstein, you are right, I skipped you and I will be back to you as soon as Mr. Zissu finishes.

[fol. 593] STATEMENT BY MR. ZISSU

Mr. Zissu: We will rest on the short memorandum which we submitted, which concerns itself with the treatment of background music.

I speak probably for the largest numerical group of ASCAP members, some 142 composer members, comprising among the group the very well known composers of this

country.

We see this proposed amendatory material is, far more than a pigmy step forward and we see no less the retrogression which it has been said will follow. We see in many areas great promise and we see possibly the thrust and the modern treatment of music and the ultimate giant step forward which operation in the future may well demonstrate it to be.

However, there are areas of controversy, such as the Court has already heard, upon which we need not express ourselves. I just want to limit my observations to the

treatment of background music. .

This point was gone into by counsel preceding me and I merely want to stress as to the aspect of differentiation,

meaning discrimination, your Honor, that nowhere in the [fol. 594] music market does this occur. When you buy sheet music, it doesn't bother you whether you are buying Tea For Two or something which is currently popular and may never become a qualified work. When you buy records, likewise. When feature performances are involved, likewise.

Then why in this area, when musical selections are being used in a background context for the same purpose and in the same fashion, should one composition receive favored

point weighting greater compensation than another.

Surely, if Tea For Two is that great a composition which it is, and undisputably it is, it will receive not only these earnings of these various categories outside of ASCAP, as well as in ASCAP from feature performance, but even within the background use area, that frequency of use so that it will receive its due return.

What is possible under this decree is that the selection of inordinate taste, or value, by a Bernstein, by a George Anteuil, an Eli Seegmeister, serious composers of ASCAP, of the same duration, say 32 second, as against a popular song which can be fragmentarily recognized in terms of [fol. 595] 10 seconds? In one case that 10-second popular song when immediately recognized receives the full use credit and in the other case the superb symphonic music, perhaps, which the producer of the program has specially chosen as against Tea For Two, to serve his purposes in public acceptance, that will receive 1/20 of a credit.

Three minutes' use of the symphonic background selection would only receive one-fifth of a credit. The other in terms of 10 seconds work would receive 1/20. We say that is

unfair and manifestly so.

With that I want to rest, your Honor.

Thank you.

The Court: Mr. Rothstein.

STATEMENT BY MR. ROTHSTEIN

Mr. Rothstein: The people I represent are opposed to Sections II and III of the proposed order. We believe that the provisions of these sections will very seriously restrict

and perhaps even destroy competition between the members of the ASCAP, and do violence to existing rights and

obligations of the contract.

We believe that this order, the effect of this order, will be the creation of a master plan which will have the effect [fol. 596] of making payment certain to those dominant writers and publishers of the Society in the areas in which they now receive their greatest number of performances. That is the television commercial and sustaining network programs, and the radio commercial network programs.

We believe, too, that the proposed order will continue and will heighten the uncertainty of payment that is now the lot of the run of the mill publisher and writer, who must rely for the greater bulk of their performances on

local station uses and sustaining network radio uses.

If our premises have any basis in fact, then certainly one of the underlying purposes of this entire litigation has been aborted. Since one of the main factors behind the institution of this action was the preservation of competition among and between the members of ASCAP itself, and in this light I would think it well to keep in mind that according to our estimates in every year there are over one hundred million performances of musical compositions on local radio stations.

Of that vast number, more than 99 percent of these [fol. 597] performances never appear on any survey previously conducted or that will be conducted under the

s proposed plan,

I had intended, your Honor, addressing myself as well to the security provisions of the proposed order, and I was anticipated by Mr. Lopez's statement, so will limit my remarks on that point merely by saying that I agree wholeheartedly with what he told your Honor, and I will amplify his statements just a bit by making this observation.

When the writer became a member of ASCAP, he did so pursuant to contract. His acceptance or his subscription to the Articles of Association constituted a contract, and by the terms of that contract he agreed to an extended term of payment. Under this new plan, of course, this is and will be eliminated. The writer's money was withheld from him

for the purpose of this extended term of payment, so he might continue to receive payments for as much as 20 years after his productivity had ceased or his widows and orphans receive it for that period after he died and was no longer receiving performances.

However, this will all be eliminated under the proposed

order.

[fol. 598] I submit to your Honor that this amounts to a certain confiscation of property without just compensation.

The Court: But the Court is not ordering this. The Society is coming in and consenting to it and if these individual members have a claim against the Society by reason of any settled agreement it is not being adjudicated here. I take it, though, when they did become members of the Society, they bound themselves subject to any modification that the Society might thereafter create by their vote, and that was the agreement they made.

Mr. Rothstein: That is very true.

The Court: That is the theory under which ASCAP now comes in and consents to it.

Mr. Rothstein: But the Court has a right to state to

ASCAP that it may not properly do this.

The Court: That is far beyond my power. I cannot regulate the monetary obligations arising from any contracts that you say exist between ASCAP and its members. That is a matter for State Court litigation. I can only intervene so far as it contravenes and interferes with interstate commerce and contravenes present law.

Mr. Rothstein: Since the Court has retained jurisdiction of the entire action and the decrees which have . been entered, which deal in part with this very subject, if not in precise words with the substance of it, then it is

certainly within your Honor's jurisdiction.

The Court: I retain jurisdiction, but that jurisdiction is limited by statute. That does not include the power to adjudicate upon any constructural relations that might have existed by reason of their own independent undertakings between ASCAP and any of its members.

Mr. Rothstein: Apparently ASCAP feels-

The Court: That is not my business. That is for them to determine themselves.

Mr. Rothstein: It is being submitted as part of this

proposed order.

The Court: ASCAP comes in and says, "We consent to this." At least I anticipate requiring them to say that before I accept this decree, if I do accept it.

Mr. Rothstein: Very well, sir.

I wish now to address myself—

The Court: So if these widows and orphans—God forbid [fol. 600] I should take money from any of them, I constantly try to do my little acts of charity within my own limitations—if these widows and orphans are deprived of anything, it is not by action of either the Attorney General or this Court. If they are deprived of anything in which they have a vested right, they have their remedy at law in a state forum.

Mr. Rothstein: I wish to speak, sir, with reference to the treatment given in the proposed order on the perform-

ance obtained on radio sustaining networks.

Under the proposed order, there will be no payment whatsoever for these performances. That is, I repeat, a performance on a radio sustaining network program. It is proposed that these performances will be picked up and be reflected by the surveys of local stations as set forth in the Dean formula, and that payment will be made on that basis. That means, sir, and we have figured out, I will say in a rather loose mathematical way, because we do not have the precise figures, but our estimate is that perhaps one out of every 333 songs so performed will stand a chance of being picked up on a survey.

[fol. 601] The Court: Apparently your calculations differ

with Dean's.

Mr. Rothstein: I will show you he agrees with me.

The Court: I know of your years of dedication to this entire industry. What we hope to do is to try out this system that has been devised by this specialist in the field, Joel Dean Company. Let us see if it works. If it doesn't, we will modify it and change it. Examine it every six months, see how it is functioning, and more or less by a trial and error method, not repeating the same error again, we make progress in life, and that is what is hoped to be done here.

Mr. Rothstein: We dispute the expertness of Joel Dean in this field.

The Court: I don't know who they are even.

Mr. Rothstein: We dispute and we do not accept his formula as that of an expert. We say seriously there is no recognized expert in this field, and there has never been a reliable survey in this field.

The Court: Perhaps experience will be the best expert [fol. 602] you can summon. Experience. Try this out. It is an improvement. It is an improvement on what you have.

Mr. Rothstein: There is an area of difference between your Honor and myself, because I do not consider this an improvement. I consider this a retrogression. In addition, I say, your Honor, if we must use the trial and error method, why must we obviously start with something that is mani-. festly wrong, unfair and inequitable? Why not strike that out at the very beginning and proceed with something that will perhaps give a better benefit of fairness to other members of ASCAP!

i would like to tell you why this is manifestly unfair and inequitable.

The Court: Very well.

Mr. Rothstein: Prior to 1996, ASCAP arbitrarily allotted 24 credits to a writer and 22 to a publisher for a network sustaining program use. Effective January 1, 1956, ASCAP just as arbitrarily reduced this figure to three credits. This was done without consultation with or even advance notice to the Department of Justice.

[fel. 603] We of course objected very strenuously to that and we even sought intervention on that point, as your Honor may recall. In opposing our intervention, the Department of Justice told us, "We agree with you as to ASCAP's action, we will look into, we will take measures to correct it."

The Court: At that time the Department of Justice was studying this whole situation.

Mr. Rothstein: I am not criticizing, your Honor.

The Court: They are honest, sincere in their efforts, they are competent and able, and they have given this Mr. Rothstein: I was not about to say anything in derogation of the Department of Justice.

The Court: Very well.

Mr. Rothstein: However, we do disagree with the solution that they arrived at with ASCAP. We must remember, too, there is some language in the proposed order and in the formulas evolved by the Joel Dean Association that payment to members will be somewhat in proportion to ASCAP receipts from different avenues of their licensees.

[fol. 604] Now, a network pays one license fee to ASCAP and that license fee is based on its total receipts from all types of programs, whether musical, news, sports, commentary or otherwise. There is no breakdown or allocation in its payment to ASCAP for commercial programs, sustaining programs or otherwise.

It pays this license fee to ASCAP in order to have the availability of the entire ASCAP catalog. Again, no breakdown is made in the catalog that so much money will be allotted to this particular musical composition and so much to that. The entire catalog is made available to the licensee and whether the licensee uses it once, not at all, or millions of times, the same license fee is paid.

[fol. 605] The Court: Mr. Rothstein, you would be surprised to see the diligence and the industry with which the ASCAP members are represented at these hearings which

I held before me to fix these royalty fees.

Mr. Rothstein: I know that, sir.

The Court: I think that Mr. Finkelstein and Judge Pecora and those who come down representing the Society ofttimes are asking for far more than they should get, and yet they persist.

Mr. Rothstein: I am in accord with that. They should

get it.

The Court: I mean the Society comes down and they don't surrender any rights of any of the members.

Mr. Rothstein: No, sir. I am not saying that.

The Court: They try to make the best deal they can and get as much as they can for the members of the Society. In fact, they persist.

Mr. Rothstein: And I am all for that.

The Court: I know you are, but at times they persist to

such an extent that maybe I get aggravated.

Mr. Rothstein: This is not my implication, your Honor. I simply want to make the point that the network pays its fee to ASCAP regardless of use or non-use it makes of [fol. 606] the music.

The Court: That is the way they want it and they don't want the television people and the radio people—I've had them up five times now-

Mr. Rothstein: I am not quarreling with that.

The Court: -on the radio stations.

Mr. Rothstein: I have no quarrel with that.

The Court: And I told-well, I won't tell you what I told Mr. Finkelstein and Judge Pecora the last time they were in, but they might tell you confidentially.

Mr. Rothstein: Your Honor, I don't quarrel with that method of payment.

The Court: Well, I do.

Mr. Rothstein: Well-

The Court: All right. I want you to know that these agreements are ultimately made between ASCAP and the television stations and the radio stations and a group representing Muzak and background music, and they are arrived at after very competitive, arm's length dealings in which no side gives or takes any quarter.

Mr. Rothstein: I have no intention to imply otherwise.

[fol. 607] The Court: They are very able and astute negotiators representing ASCAP. I think that you should take cognizance of that fact when you speak of these con-

Mr. Rothstein: It was not my intention to imply that ASCAP did not collect enough money.

The Court: Maybe you would like them to collect more.

Mr. Rothstein: I guess no one here would quarrel with.

The Court: Except the fellow who would pay it.

Mr. Rothstein: Except that person.

The Court: Let's get back, though. I want you to know that these agreements with the television people, with the radio stations, with all the other users are the best termsMr. Rothstein: True.

The Court: -that real negotiators and bargainers were

able to accomplish.

Mr. Rothstein: True, but my only point in bringing up those agreements, your Honor, was to emphasize that the licensee is paying for the availability of the ASCAP catalog, and he may not even use it, theoretically, but is still paying that license.

[fol. 608] The Court: You would be surprised. Some of them say they don't use it one-quarter of the time and

they have to pay for it.

Mr. Rothstein: That's right. Therefore I say, if ASCAP collects its license fees based on the availability of its catalog and repertory, then certainly it should make distribution to its members based upon the availability of their compositions.

The Court: You miss my point. ASCAP collects it that way because that is the only way they can as a result of

business dealings collect it.

Mr. Rothstein: That's right.

The Court: It is not as a result of their choice.

Mr. Rothstein: I think that point is immaterial. Whether it is their choice or not that is how it is being done, sir.

The Court: All right.

Mr. Rothstein: The radio network makes available to all its affiliates its sustaining program. The affiliates pay the network for the use of these sustaining programs. They may not use it, but the fact is that these programs are piped to every station in the chain for its use and availability, and the music of ASCAP is being made avail-[fol. 609] able to all these stations. Therefore I say, to eliminate payment for a sustaining network use is an unrealistic approach to this.

It has been argued here yesterday that the reason why this is done is that it is impossible to ascertain the number of stations in a network that actually carry the particular sustaining program. If that is the basic reason for this elimination in the proposed order, this is not a fact. It is not a fact. We have ascertained through information received from network officials that this is a very simple matter to be done. It is not only an easy matter to be done; it can even, if necessary, be required in the license agreements between the parties involved, just as your Honor required Muzak to log its numbers to ASCAP.

The Court: Muzak is a different proposition. I have had the experience of having the representatives of these television and radio stations present at a negotiating table, and I really feel it is not part of judicial duties but it has been thrust upon us, and I know how reluctant both of these enterprises are to furnish programs of each piece and over each station and how they object to ASCAP going in and looking at their books and examining their books and finding out what they get.

[fol. 610] That has been one of the bones of contention that Mr. Finkelstein has been trying to get for a number of years complete and unrestricted access to these books by the accountants, and that is one thing that they have

been constantly resisting.

Mr. O'Donnell: May I ask a question?

The Court: Yes,

Mr. O'Donnell: I don't think I heard counsel correctly. May I ask if he is contending to the Court that no payment is to be made for any music that is played on sustaining

The Court: No. He does in one breath, but then he pulled it back and he corrected it. He correctly stated it.

Mr. Rothstein: I said that it is proposed that these performances will be picked up and reflected on the local

The Court: You correctly stated it.

Mr. Rothstein: And coming to the local survey, the survey of the local stations which is proposed in the amended order, according to the Dean formula, we believe that this is a most inadequate and inequitable system which can only be destructive of competition, and I again ask your Honor to bear in mind that one of the purposes of [fol. 611] this action was to preserve and foster competition between the members of ASCAP itself, and I say that this is destructive of competition for this reason:

The great bulk of small writers and publishers can only look for their performances on local station programs or sustaining network programs.

The Court: Let me ask a question, Mr. Rothstein, because you have appeared before me a number of times in these ASCAP matters and you have contended that the present decree did not afford the full protection it should.

Mr. Rothstein: Yes, sir.

The Court: That has been your consistent position,

Mr. Rothstein: That's right, sir.

The Court: Do you feel that this proposed decree now is an improvement?

Mr. Rothstein: No. sir.

The Court: You do not. What would you have the Court

do, reject it?

Mr. Rothstein: Well, your Honor stated yesterday and, I think, this morning as well that you must either accept or reject, it, that it is not within your province to rec[fol. 612] ommend—

The Court: I cannot dictate compromises, and that is

what this is, a compromise.

Mr. Rothstein: Yes, sir. My own feeling is, sir, that the government may properly present a petition to your Honor for a modification of the decree and your Honor may take testimony only with reference to such proposed

modification and need not open the entire case.

The Court: I believe that that is not so. Once you take a settlement, and that is what they did by the consent decree, you either abide by that or you get a further consent decree or you have the consent decree set aside and proceed then to try the lawsuit. That is a basic principle of law which is applicable to antitrust suits as well as all other forms of litigation.

Mr. Rothstein: You are asking me in effect whether I would, if there was no alternative, suggest that the case-

The Court: There is the other alternative of having a trial.

Mr. Rothstein: Yes, sir, if that would be my choice.

The Court: Yes.

Mr. Rothstein: And it seems to me, sir, that rather [fol. 613] than perpetuate what is basically an illegal setup and situation which cannot apparently be modified to the satisfaction of the parties concerned, this may perhaps be the only alternative.

The Court: Do you realize that that perhaps may result

in an order of dissolution?

. Mr. Rothstein: This is very possible, sir, and I think that I could recommend an alternate solution which can obviate that necessity.

The Court: You would be better than Solomon, and he

is dead for a long time.

Mr. Rothstein: I am stating this, your Honor, of course,

in the context of my own perspective.

The Court: I tried in the past six or seven years, I think it is, that I have had this matter to find out some way that I could suggest that would solve this so that I wouldn't have to devote at least four weeks a year to these ASCAP matters as an umpire, referee, business arbitrator and business czar. It is not part of judicial duties and it is not satisfactory to me by any means. I have not come up with any solution. I don't know what is better than what we have. I don't know of any remedy.

Mr. Rothstein: I have always believed, and if I am [fol.614] correct in this belief I don't know whether it will call for your thanks or for you to berate me-

The Court: I won't berate your Mr. Rothstein, I try

not to berate anyone.

Mr. Rothstein: I say this in a jocular sense purely.

The Court: I may seem to do so because of my Celtic nature.

Mr. Rothstein: But I have always believed that the several intervention proceedings I filed in 1956 were the direct cause of having this case assigned to your Honor. I may be wrong in that, but that was my impression at that time.

The Court: Are you the fellow, then, to blame? If you were younger I would think you were a juvenile delinquent.

All right, let's get back now.

Mr. Rothstein: This is the way I would solve the situation, and I think my solution would take this entire thing out of the realm of the courts and it would never be a burden to the courts again except with respect to such matters as might incidentally arise from time to time in the operation of any organization.

My solution is the per use per selection basis of payment, a hundred per cent payment for a hundred per cent [fol. 615] use. If your song is used, pay for it. A song is a property right. It is a commodity.

The Court: Yes, but—

Mr. Rothstein: We can do it. We can do it. Please hear me out, your Honor.

The Court: But it will cost you more.

Mr. Rothstein: I disagree and I am going to show you

that it is wrong.

ASCAP has always insisted that this is absolutely impractical; the cost will be prohibitive. I have never known, nor have I ever been able to obtain any information as to what efforts ASCAP or anyone else ever made to determine this.

We, ourselves, recently approached several large corporations in this country that are experienced in assimilating data with the use of electronic equipment, and only recently, under date of October 15th, we received a letter from the Burroughs Corporation which is one of our largest. Please remember that they are acting on the information we gave them, not that ASCAP gave them. But they tell us in their letter, and your Honor might be interested to see it, that on the basis of processing 300,000 song performances a day they figure a yearly cost of only \$828,844, and if this is anywhere near accurate it is cer-[fol. 616] taims not so prohibitive a cost that ASCAP cannot undertake it and do justice to every songwriter and publisher member.

The song, I said before, is a property right. The man produces it. It is used. He should be paid. He is entitled to payment. He is not entitled to have to gamble on a

333 to 1 shot.

The Court: Doesn't he create this gamble, it it exists, by reason of his own act?

Mr. Rothstein: No, sir, and I will tell you why. Because

you said yesterday-

The Court: He doesn't have to be a member of ASCAP.

Mr. Rothstein: Exactly, I am just coming to that. You said he can resign. Certainly he can resign. You put that question to various experts and they gave you various

reasons why he could not resign practically. I will give you another reason which to my mind is the most important

reason why he cannot resign practically.

That is because of the blanket license, because if I as a member of ASCAP resign from ASCAP and take out my 2 or 22 or 52 songs F cannot compete as an individual against the use of the blanket license which is peddling [fol. 617] hundreds of thousands of titles for one fee. I cannot compete. That is why the man cannot resign. I say to you, your Honor, and I believe this very—

The Court: Wait a minute. Hasn't ASCAP got com-

petitors now? Isn't SESAC a competitor?

Mr. Rothstein: Still using a blanket license,

The Court: But they are a competitor. Mr. Rothstein: On a very minor scale.

The Court: Isn't Broadcast Music a competitor?

Mr. Rothstein: In only one sense. They are essentially an organization for publishers. Out of a \$10,000,000 annual income all the writers in Broadcast Music get a few hundred thousand dollars in distributions. The writer members of Broadcast Music have no standing whatsoever.

I also say to your Honor that in my opinion the root of all this trouble, essentially the reason for all the internal dissention and squabbling in ASCAP and the only reason why we are here today and why we were here ye terday is because of the internal trouble in ASCAP which lies in the blanket license because the fees are collected on that basis.

The Court: I am not going to hear you on that. I think I have given you enough time. I will read your brief.

[fol. 618] Thank you very much.

Now Mr. Niles. I would like to hear everybody in opposition this morning so that I can hear Mr. Dean at 2 o'clock.

STATEMENT OF MR. NILES

Mr. Niles: I don't want to talk long, your Honor, but I don't want to talk under any misapprehension because I am not attacking this decree.

The Court: Are you speaking in favor of it? Mr. Niles: I am perhaps in the wrong gallery. The Court: All right.

Mr. Niles: I am speaking in favor of signing it. I am speaking from the angle of seniority and the current performance.

The Court: Come over here, Mr. Niles, Whom do you

represent?

Mr. Niles: I represent Handy Bros. Music Company which is a fully owned corporation of the W. C. Handy estate.

The Court: All right.

Mr. Niles: I represented Mr. Handy and his company from 1925—

The Court: He appeared before me several times as a witness. He was a great musician and he was blind, was he not, for some years before he died?

[fol. 619] Mr. Niles: Yes, in his last years.

The Court: He was a witness, and we all had great respect for him. All right.

Mr. Niles: And what I would like to say is approximately

what I think he would have wanted me to say.

The Court; Then you say it. I think everybody in the industry had great respect for Mr. Handy. He was a great musician and a good man. You say what you have in mind.

Mr. Niles: The beneficiaries of the trust under which the stock of his company is held are his widow and his

children and his brother and sister.

He was an intensely loyal member of ASCAP. He felt at all times that, far from discriminating against him as a negro and as a small fellow in the publishing world, he had gotten an even shake in ASCAP. He supported ASCAP and his company did as far back as the '20s when ASCAP was not in as secure a position as it was before the government got after it. As far back as the '20s I could hardly induce him to sign a contract, anything short of a lease, unless it had something in it about being subject to the rights of ASCAP which are to be respected.

I don't think that any question that has been raised here [fol. 620] is as vital as that of getting a decree signed that will let ASCAP live and continue to do for publishers and writers, both great and small, what no one of them can do

but ASCAP. They can form other associations. But that takes work and application and brain power. That can be done. It has been done.

I want to submit that the idea is incorrect that the only fair distribution system under which an organization such as ASCAP can function is one based purely on current performances or, let alone, on separate payment for every use to cover everything. I cannot cover all the ramifications of that, but I am experienced as a musical historian and I know something of the musical history that bears on that subject and particularly the seniority provisions of the consent decree.

W. C. Handy, as is common knowledge, was the first to introduce the form of negro folk music to the public which he did with the Memphis Blues written in 1909 and published in 1912, followed by the St. Louis Blues and many others. He was not only the first to introduce that form, but except for him the blues idea might not have become [fol. 621] known at all. These were songs of a different-kind from any that preceded them. It was not only in the overall form, in the 12 bars and the 3-line verse and so forth; it was in details of harmony, it was in the blue note, it was in the use of the grace notes and other things that have become a part, a large part of popular music and one of the largest parts of jazz since then, as p opie-of the stature of Mr. Gershwin have acknowledged.

There is a real debt today to Mr. Handy because of the current music which now accounts for ASCAP's income is in large part based on the foundation which Handy built, and the same could be said of Irving Berlin with

his influence on ragtime.

The Court: I think, Mr. Niles, we all join with you in paying tribute to Handy. He was a great musician.

Mr. Niles: That is no what I am trying to do, your

Honor, now. I am speaking about Irving Berlin.

The Court: Irving Berlin, too, was quite active. But do I understand now on behalf of the Handy estate that you ask the Court to approve the proposed decree as now submitted?

Mr. Niles: You do so understand, but I was offering a [fol. 622] reason for it, and I will forego any further praise of Mr. Berlin or Mr. Handy or Mr. Gershwin, but I would like to say a few more words.

The Court: You can take that as being undisputed facts in the record. Now, if you will give me your reasons, I

would appreciate them.

Mr. Niles: I say that these writers should have credit not only for the income which is directly brought in by their works but for most of the income from most of the songs written in their categories since they burst on the scene. Their work has been getting rewritten ever since they started writing. They started styles which have increased the popularity of popular music and have increased the income from popular music.

So it is not true in any substantial sense to say that the seniority funds that are involved in this decree give any writers or publishers more than their works have earned

or cut them into anybody else's income.

These fees that come into ASCAP, as has been pointed out, are not on a piecemeal basis. They are lump sum fees for access to the entire extalog, and no amount of mathematics can determine the amount of money which is brought

in by any individual use.

The famous songs of years past that are controlled by [fol. 623] ASCAP are a major selling asset in fixing its fees, and so are the names of the publishers and the writers whose songs they use. And the 1959 or the 1960 group of songs, regardless of how often they may be used in the first few months and possibly thereafter, is a negligible asset in bringing ASCAP's contracts into being.

There is, therefore, no basis for any claim that the current performance system is the only one that can give the member the equivalent of his own contribution or avoid

robbing Peter to pay Paul. It is the reverse.

I think that violence is done to the principle of seniority in the proposed decree, especially in the case of publishers. I hope in the future it can at some time be remedied as the results become apparent.

I don't like to tell you that I don't think they are just, but I do not seek to sacrifice the reaching of a decree to the

interest of my clients as are involved or would be furthered by knocking those or throwing the baby out with the bath.

The Court: Or out of the window. Thank you very much,

Mr. Niles.

Mr. Niles: Thank you. The Court: Mr. Kaufman.

fol. 624] STATEMENT BY MR. KAUFMAN

Mr. Kaufman: If it please the Court, I think there has been a good deal of pro and con and I am not going to belabor any one point, just make some observations.

Firstly I think we should realize what is the most fundamental concept of the Society. It is merely a collection agency and as such we advocate that this proposed decree is inequitable in that it proposes again to pay for availability. As a collection agency we should be paid per performance.

There are some improvements, so to speak, but only on paper, if it pleases the Court. One-twelfth of the votes can elect a director. But does the average member have available to himself the records of the Society so he can meet with the other members? Some of us have tried to get records from the Society. As a matter of fact, in Mr. Dean's speech before a membership committee he states that such records will be available if it is properly sought. Who is to determine whether it is properly being sought!

The Court: Me.

Mr. Rothstein: I appreciate that, Judge. Going back a period of about eight months one of my clients made an application to the classification committee and to this date [fol.625] he has not had available to him an inspection of the records without an application to the Court, of course. Why? Because we have been confronted specifically with "What do you want?"

The Court: The trouble is this, and let's be frank about it: ASCAP has had certain competitors enter the field. In order to protect ASCAP and its members from those competitors who have at times associated themselves with members of ASCAP and former members, ASCAP has had to zealously guard some of its records as a matter of protection to its own members. That is the fact.

Mr. Kaufman: Generally that is so, your Honor, but where an application is made by a member of many years'

standing-

The Court: No application was made to me that was not heard. The only one was Mr. Rothstein's, and he wanted to intervene, and I felt at that time, and I was assured by the Attorney General, that this matter was receiving their study and their attention, and it was, in fact.

I said, "Mr. Rothstein, I won't permit you to intervene. You have no standing here. Besides the Attorney General

is investigating this matter."

[fol. 626] But if you have a legitimate inquiry and your client wants some information as to ASCAP, it is not a secret organization in so far as its members are concerned except in so far as it must be secret for the self-preservation or for the protection of those who pay them fees.

Mr. Kaufman: But what can be secret if a member objects to his classification and tells me "On what do you predicate my classification? Give me the recording that you have logged. Give me some information on which you base it."? Unless we can give them specific data which we don't

know vet-

The Court: Did you make a complaint to the Attorney General?

Mr. Kaufman: No, sir, we did not.

The Court: They have the right to go in and inspect the books of ASCAP under the existing decree, and they would have done it had your complaint had any merit to it. But you didn't give them the opportunity.

Under the present decree, under the proposed decree the Attorney General, functioning through the Antitrust Division, has the right of access to these books and records.

Mr. Kaufman: That would mean that we would have to [fol. 627] have the government and the Court be a permanent watchdog to protect our rights. If we can't get from our own association—

The Court: If you feel that you have been deprived of your rights, the government in its Antitrust Division is supposed to be the watchdog once a decree has been entered.

Mr. Kaufman: All right. But we can anticipate what is going to happen. The proposed decree says that every mem-

ber shall have the right to inspect the records. Yet, reading on page 39 of the message sent out by the Society of a speech made by Mr. Dean, it says "Any member or his authorized agent will be permitted to inspect such lists and such records with respect to his own compositions. Other portions of such lists and records shall be available for inspection by any member or his authorized agent to the extent that inspection is sought in good faith."

Who is to determine that? Only the powers in being. [fol. 628] The Court: Their decision is not final on that. Mr. Kaufman: Then we have to make an application to

the Court.

The Court: No. You go down to the Attorney General. You can go down to the Attorney General, the Antitrust Division. You just write them a letter. In fact, they have an office right here in this building.

Mr. Kaufman: Again I say, your Honor, that we seek compensation for performance and not because anyone has

a catalog that may be available.

To draw upon your own analogy, just because we seek to buy a serge suit that may be in stock or is generally kept in stock doesn't mean that a premium is paid for that suit, that more is paid for a blue serge suit than for a green cheviot. They are all available and we buy what we want and pay for what we buy.

We object to the decree, Judge. I don't want to belabor any more points. Thank you for the opportunity to speak.

The Court. Now, Mr. Edgar Battle and then Mr. Perry Bradford.

[fol. 629] STATEMENT BY MR. BATTLE

Mr. Battle, you are not a men ber of the Bar, are you?

Mr. Battle: No, sir.

The Court: All right. I will hear you. It will be refreshing to hear from a layman. But you are not going to read that entire book, are you?

Mr. Battle: No, sir. The Court: All right.

Mr. Battle: I just have a couple of points that I would like to talk on.

The Court: All right. Take your time now.

Mr. Battle: Your Honor, I beg for you to bear with me because this is only the second time in my life I ever appeared before a judge in a courtroom.

The Court: Don't make any statement against your

interests and disclose the other occasion.

Mr. Battle: I know absolutely nothing about the legal

language.

The Court: This is a United States court and you feel right at home. You tell us what you have on your mind.

Take your time.

[fol. 630] Mr. Battle: First I would like to talk about the survey and I would like to offer myself as a specimen. I don't think that this survey in this new decree is going to remedy anything. I think it is going to be worse than it was in the last decree, and I will tell you the reason why.

I happen to have had one of the biggest hit songs in

the country last year.

The Court: What is the name of if?

Mr. Battle: Topsy.

The Court: Might as well give it a plug.

Mr. Battle: The name of the song was Topsy, Part I and Part II.

The Court: By whom was it published?

Mr. Battle: I was the publisher, one of the writers and the publisher.

The Court: There are so many people here; otherwise I

would ask you to hum that for me.

Mr. Battle: If you ask your gandson, he will tell you all about it.

The Court: I will.

Mr. Battle: Because it had a drum in it and he was whamming all the way through it.

The Court: All right.

[fol. 631] Mr. Battle: I sought out some expert advice, because I am not a mathematician. I am simply a music writer. I wouldn't be a publisher if I had got publishers to publish my stuff. But I had to publish it myself.

My expert advice was that they think this song had in excess of a million performances. ASCAP gave me credit for 400. I can show you that in black and white. For a

million uses they paid me, through their survey, for 400 performances. That was pretty bad. But this new decree is going to pay me even less because I would get paid by way of WABC or the American network which I won't get paid any more.

The Court: Do you have any other songs, Mr. Battle,

other than Topsy !

Mr. Battle: I have about 200 songs in the catalog of ASCAP some of which they published and some that I have, myself, but about 200 copyrights at the present time. I have many more songs but that is all the copyrights I have.

The Court: You make this your profession?

Mr. Battle: Yes, sir, and they are trying to make if not [fol. 632] my profession. The way I see it they are putting me out of business.

I joined this organization because, after reading about how the organization was founded and what the Honorable Victor Herbert had in mind in gathering these people together to foster this organization, I thought it was a wonderful thing and I put all my time and effort into it. Many of the people here can attest to that. I even have had the honor of writing a song with the present president of this organization. I feel that I have given an awful lot to this organization. I don't feel that I should be treated in this manner. They are not only theating me this way—

The Court: How are you going to be worse off under

the new system?

Mr. Battle: Under the new system, your Honor, they say something about a random survey. Well, this random survey is just making another random survey, a bigger random survey. So what they did was they took a whole and added one-half to it; so, if I got 400 now, I couldn't possibly get any more than 600 performances on the next survey. But I don't see where it solves anything because [fol. 633] then they dropped out half of what you got now. That is how it looks to me.

I want to tell you, I am not a mathematician, I can't figure these things out, so I went and got somebody who was, and they told me that the least amount of credits that I should have gotten was somewhere around 360,000 or

something like that, and that is based on one performance a day over the period which they paid me for each station.

When a song becomes a hit in the United States these

stations bang it death.

The Court: And don't I know it.

Mr. Battle: And that song is not played only once a day.

It is played, I'd say, at least five or six times a day.

I want to bring out that I am not arguing here just for myself. I think they gave me a very low amount of performances. I thought they should have given me a better deal than that. But I am arguing for the other fellow who stands on the corner with me in front of the building, who writes these songs and gets a hit, too, and gets the same treatment, and it is very unfair, and I don't think that this consent decree is doing anything about it.

[fol. 634] Now I would like to talk about the distribution. My friend Bob Davis wanted to speak about this and you told him that I could speak for him. This is the area that he wanted to talk about, and I will be voicing my opinion

as well.

The Court: All right.

Mr. Battle: In distribution, I have heard it argued here and I have learned a little bit about it. I must say I know much more now than I did before because that thing that they sent out to the writers was so complicated that I don't understand it and none of my friends that I have talked to understand it either.

But we understand one thing, that the way the moneys are distributed within three years we are going to be nowhere. We are nowhere now, but we are going to be further nowhere because in three years everything that I

worked for for the last 25 years is going to disappear, and that is not only for me but for the widows and orphans, too.

The first time I ever stood up in an ASCAP meeting in my lifetime was the last meeting, and I stood up to argue for friends that I have written for that have passed on [fol. 635] Their wives and children are depending upon ASCAP and the moneys that they received and the moneys that they are receiving and would keep expecting to receive. But they, too, are going to be in the same boat as me and in three years they are going to be further nowhere.

I spoke to Judge Pecora and Judge Pecora told me that the Justice Department wouldn't allow that. I would like to ask you a question, Judge.

The Court: You mustn't ask judges questions. But you

go ahead, Brother Battle.

Mr. Battle: I will make a statement, then.

The Court: All I want to tell you that when you decided not to study law the Bar lost one of its shining members. My goodness, what you couldn't have done in front of a jury. You could have had them in tears and taken care of all the widows and orphans in those cases you could have tried. You should have studied law.

Mr. Battle: This is what I would like to ay, Judge.

The Court: You can ask me a question. Why not? Go [fol. 636] ahead.

Mr. Battle: You are sitting here on this bench and performing a service for the American people.

The Court: I have been trying my best to do that.

Mr. Battle: Yes, sir. Now how would you like, after you have sat here all these years and you have come to retire, to have them tell you that you have no pension? I don't think you would like that.

The Court: You know, I gave up a pension to come here

to sit here.

Mr. Battle: I just tried to say-

The Court: I appreciate your point, and I expect Mr. Dean to make a note of it. If you will be here this afternoon, we will listen attentively to what he says. I think that you are speaking from your heart.

Mr. Battle: Yes, I am, sir.

The Court: And you are entitled to have a special response made both by Mr. Dean and by Mr. O'Donnell. If you will come here this afternoon, we can both pay attention to what Mr. Dean has to say about that, and then I may let [fol. 637] you say some more.

Now we will hear from Mr. Bradford.

Mr. Battle: May I say one thing more, Judge?

The Court: Yes, sir.

Mr. Battle: I can't read that chart over there, and I don't know what it is all about, but I would like to say one

thing as far as foreign. I heard them talking about that

I was in the service of my country during the war as a War Department civilian overseas. I was a musical director for morale purposes, I played in many foreign countries. Everywhere I played the societies of those countries demanded that I put down every number that I played, and . those numbers were paid for. I don't see why this Society couldn't do the same.

Thank you, your Honor. The Court: Thank you.

'All right, now, Mr. Bradford, you step up. Your name is Perry Bradford?

STATEMENT BY MR. BRADFORD

Mr. Bradford: Yes, sir, Judge.

I am here by being careful. Judge, I want to ask you one question.

[fol. 638] The Court: You want to ask me a question?

Mr. Bradford: Do you see that gentleman sitting there, Mr. Fishbein? I want to ask him one question. Can I ask him?

The Court: All right. This is part of the routine, is it? Mr. Bradford: This is something that I want to ask him.

The Court: Mr. Fishbein, do you mind having Mr. Bradford ask you a question?

Mr. Fishbein: I may refuse to answer, but I don't know

what the question is. The Court: This is not testimony, gentlemen. This is just colloquy.

All right.

Mr. Bradford: We see here a Festival of American Music presented by the American Society of Composers and Authors in 1914. This was held in 1939, Judge.

The Court: 25-year anniversary.

Mr. Bradford: That's right. In this book or program I see here where seven music companies own my four catalogs. When they got down in court, when I sued them for six million dollars, which I didn't get nothing, his [fol. 639] lawyer—he didn't appearThe Court: This isn't a question.

Mr. Bradford: I want to ask him; Why did he get down in court and say you only own 39 songs when they have my four catalogs here in the book.

The Court: I will rule that question now as being im-

material and irrelevant.

Mr. Bradford: All right, sir. I accept it.

The Court: Let's come down now to what we have in hand here on this decree. You want to be heard, and you

were given an opportunity to speak for five minutes.

Mr. Bradford: All right, Judge. You see, I started the first colored songs on the records, "Namely Smith" in 1920, "Asbestos Smith" in 1922. Louis Armstrong was playing and I was singing. I had the blues and the record business tied up like this. He knows it. I had it tied up like that.

I was working for Columbia at that time, Columbia

Record Company.

The Court: Columbia Gramaphone Company in those days.

[fol. 640] Mr. Bradford: That's right. The Court: On 59th Street on the Circle.

Mr. Bradford: That's right. But, you see, it was downtown on 34th Street first and then they moved up.

The Court: That was later. That was after my time.

Go ahead now. Bell us about this.

Mr. Bradford: So I went to this fellow—he took my catalogs, my four catalogs. He loaned me \$300 and he was to go and collect my money in Europe, not here. So he takes all of my catalogs, my four prior catalogs. He loaned me that money on 39 songs, but he takes my four catalogs and put them in ASCAP.

[fol. 641] So I wrote to ASCAP, begged them. Mr. Finkelstein and none of these fellows was there at the time:

But there were four gentlemen there.

The Court: Mr. Bradford, what it seems is that you only have some personal matter here that really is not for the Court.

Mr. Bradford: Here is what I says. In 1956, Judge, I was refused six times in ASCAP, six times, but they take my songs and put them in ASCAP. I was no good.

The Court: You have a remedy if you haven't waited too long, and that is to go and see a good lawyer and start a

suit. You have a lot of good lawyers here.

Mr. Bradford: But in 1956, after they have taken me and knocked me all around, I signed an application and they refused me, and do you know what they are paying me! \$3.45 a quarter.

The Court: You are a member today, aren't you?

Mr. Bradford: Yes, sir, for \$3.45 which I don't think is fair, Judge. These fellows have taken my songs all these many years, and they have suffered me and given me a

lousy \$3.45. I don't think that is fair.

The Court: I wouldn't describe the \$3.45 in that fashion. If you feel aggrieved, you go and see a lawyer or, if you go [fol. 642] and see Judge Pecora, I am sure he will try to look into your case and see that you get every dollar that is coming to you.

Mr. Bradford: I will be there. The Judge is all right.

Thank you very much.

The Court: Mr. Redd Evans.

STATEMENT BY MR. EVANS

Mr. Evans: Your Honor, I want to thank you for your graciousness in allowing me to speak even though I am here for one of the firms of which I am a member as counsel. I feel that it will serve no purpose to speak at this time because most of the people who have spoken have very well presented my particular viewpoint, and the only thing that oI could possibly do would be to reiterate the same point of view with indignation. I would prefer not to speak.

The Court: What particular proportion of the proposed

decree do you want to register your objection to?

Mr. Evans: I would like to say, your Honor, and please forgive me because I seem a bit emotional about this because you have just seen—

The Court: You go ahead now.

Mr. Evans: Very well, sir. I would like to say that there is not one portion, not even one portion, of this decree that has not been subverted since 1950 to the present day, not [fol. 643] one.

The Court: We are talking now about the new decree. Mr. Evans: That is exactly what I am talking about.

The Court: What is the matter with it? What do you

object to in this proposed new decree particularly?

Mr. Evans: Sir, I would not like to stand here and discuss this. Either I will come up-

The Court: No. You cannot do that. Then you rest upon the statements made by your attorney, Mr. Horsky?

Mry Evans: Yes, that is quite true, and I rest further upon the statement that I made before.

The Court: All right, Mr. Evans. Now Mr. Freedman.

STATEMENT BY MR. FREEDMAN

Mr. Freedman: Yes, sir.

The Court: I have your name down as one who wanted to speak.

Mr. Freedman: May I from this point state my very short remarks.

The Court: Surely. What is your interest in this matter? Are you a publisher?

[fol. 644] Mr. Freedman: Yes, a publisher, sir, Temple-

ton Publishing Company.

I would like to know how it is possible for a song which I venture to guess everyone in this room knows very well and which has been performed in at least five figures since May of 1958-I should like to know why this song has not as yet even appeared on our statement.

The Court: What is the name of the song?

Mr. Freedman: "Be Sociable." Would you like me to

sing it, your Honor?

The Court: No, I know it. I suppose I will have to tell this off the record.

(Discussion off the record.)

The Court: Mr. Battle?

Mr. Battle: Your Honor, you told me I could speak for Bob Davis, and I didn't get a chance to touch on his subject.

The Court: All right. Let Mr. Freedman talk and finish what he has to say first.

Mr. Freedman: P would like to know, your Honor,

how it is possible in any system-

The Court: Suppose we ask Mr. Dean to make a note of that and refer to that when he speaks this afternoon. [fol. 645] You want to know how it is possible for a song which has been a hit not to appear on your credit sheet.

Mr. Freedman: I didn't say a hit, sir. I said in terms

of performances in recognizability.

The Court; It has been a fairly good number. Would you say that?

Mr. Freedman: At least.

The Court: Fairly good number. We will have that answered, I hope, by this afternoon for you. Is there any-

thing else you wanted to say, Mr. Freedman?

Mr. Freedman: I would like to ask a question of Mr. Kilgore whom I recognize as one whom I have met on more than one occasion in the Justice Department building. You, your Honor, have made reference to the fact that the Justice Department could go into the ASCAP books and find out whatever they wish to know.

The Court: They have a right of access and of inspec-

tion.

Mr. Freedman: May I then ask Mr. Kilgore if he has done that in this connection with the proposed consent decree?

The Court: I will ask Mr. O'Donnell who is here to later

on make an answer to that this afternoon.

[fol. 646] Mr. O'Donnell: Yes, your Honor.

The Court: Mr. Battle, you wanted to say a parting word.
Mr. Battle: My brother Bob Davis would like to have the
Court know that ASCAP—

The Court: What does brother Dayis' business? Is he

a publisher?

Mr. Battle: A songwriter. He says that since the ASCAP—the Society is licensing its works to the people that are using it on a blanket basis he would like to know if it was under the providence of this Court to have ASCAP set aside a fund so that the members of ASCAP that are receiving nothing for their works would be able to get something on a basis of seniority or such. He told me to ask you that as a question.

The Court: I can't do anything except what has been agreed to by the parties here. However, we will ask Mr. Dean or Mr. O'Donnell. You answer that one this afternoon for Mr. Davis.

All right. Now we will adjourn until 2 o'clock.

(Luncheon recess taken until 2 P. M.)

[fol. 647] ...

AFTERNOON SESSION

2 P.M.

The Court: I think we will go ahead. First we will hear from Mr. Dean.

STATEMENT BY MR. DEAN

Mr. Dean: If the Court please, when I was first retained in this matter, I discussed what seemed to be the problem facing ASCAP and the Department of Justice. I advised Mr. Finkelstein and Judge Pecora and Mr. Cutler of Washington, regular counsel for ASCAP and the board of directors, that it seemed to me that in working out this proposed consent decree, if we can work it out, that we had a rather broad social problem, and part of our problem was to make sure that each member of ASCAP was dealt with fairly and equitably, and that each member of ASCAP had complete access to the records of ASCAP in so far as it concerned the allocation of ASCAP income to him, and that there ought to be some better method of classifying these performance credits other than based on subjectivity. I also advised them that there ought to be some direct appeal to some organization like the American Arbitration Association.

After we studied this matter for some time, it became quite apparent to me that despite the fact that we were dealing with songs and lyrics and public taste, and some [fol. 647a] songs were what might be called serious music, concert or chamber music, others might be jazz, some might be rock and roll, some might be religious, that the primary question was whether each of these writers was being dealt with fairly and whether or not ASCAP itself was in the public interest, and whether or not you could with the Department of Justice and with the approval of the Court

work out a consent decree; that despite the enormous complexity of the problem, with large individual writers and the various catalogs of the publishers, whether it was possible to work out any kind of a consent decree which would be generally acceptable to the members, acceptable to the Department and to the Court.

After studying the matter for some time, I felt that we ought to get in some completely independent survey organization. After discussing the matter with the board, they authorized me to retain this Joel Dean Associates. I believe that that organization, based upon the program that is outlined in the order that your Honor has already signed and in the memorandum that they sent out, is honestly going to try to do an able and honest job and as scientific a job as is humanly possible. I think they are going to do their [fol. 648] level best to reduce the margin of error to a minimum and then by trial and error try to reduce those margins of error.

As far as the provisions of the order, with respect to your Honor's right to appoint some independent and qualified person to review these procedures periodically, and the order is broad enough so that you can go into the whole question of the depth of a sampling and the conduct of the survey and the accuracy of the data fed into the survey, I would like to say that I think that rests within the sound discretion of your Honor.

As I read the proposed order, it would seem to me that if the person selected by your Honor is not himself an expert in the sampling field, that your Honor has the discretion to select somebody of competence and ability and independent who in turn, if your Honor so wishes, could exercise or supervise another independent expert in this sampling field. I merely want to point out that I believe your Honor has discretion as far as the wording of the order is concerned, and that you are not limited for the purposes of the order.

As I read the order, it is in connection with whether this survey itself is accurate and whether it is being properly [fol. 649] conducted, both as to manner and as to content.

Let me address first to this question of timing. When the order was drafted last spring, we hoped it could be made effective on or about October 1st of this year. Accordingly,

there are several references in the consent order and in the attachments to the consent order and in the writers' distribution formula and the weighting formula to the date October 1, 1959, the time when some of the provisions would go into effect.

The Society for many purposes is on a fiscal year basis, starting October 1st of each year, ending on September 30th. So that the current performance option, for example, is addressed to a full fiscal year as are certain other provisions.

In response to the question of whether we could not speed up this time, I have suggested to the Department of Justice, and they agree, that on the assumption that the proposed consent order meets with your Honor's approval we would review all of the dates now set forth in the various provisions of the order in an attempt to get the earliest date possible as a starting date for each of the provisions. We would then join in asking your Honor to substitute [fol. 650] these new dates for those currently appearing in the document submitted.

Let me for just a moment discuss the timetable that we have in mind and some of the procedural problems. We feel that it would take about 75 days between the time, assuming approval were expressed by your Honor, from the time of the entry of the proposed consent order and the time when we can certify to the Court that the membership had approved the necessary changes in the Articles of Association. But the Articles of Association of ASCAP require the following steps for amendment. First the board of directors has to call a membership meeting on the West Coast and one in New York to discuss the proposed amendment. This will require about a week for printing and mail-. ing, plus two weeks' notice of meeting, with about one week interval between the two meetings. My calculation is that this procedure will consume about a month. After the membership meeting, the ballots must be mailed to each member, who has 20 days within which to return his ballot. Then it will take a few days to tabulate the results.

The Court: Does each member of the Society—you don't mind me asking you this, so I can understand what the situation is—does each member of the Society have one vote!

[fol. 651] Mr. Dean: Yes, sir.

Mr. Milman: No, your Honor.

Mr. Dean: Each member of the Society has a vote in accordance with the weighted schedule of voting that is currently set forth in the 1950 decree.

The Court: For instance, I was told that there are 1,100 publisher members and that there are 5,300 author

and writer members, approximately.

Mr. Dean: That's right.

The Court: I understand that the by-laws provide that there should be weighted voting.

Mr. Dean: That's right.

The Court: And each member having a weighted vote in proportion to his interest, which is set by the by laws, in the association.

Mr. Dean: Yes.

The Court: Is there any way of having at the same time for the information of the Court a ballot taken on a purely numerical basis, so that we could determine how many publishers, by number, are in favor of this and how many authors by number, authors and writers by number, are in favor of this?

Mr. Dean: If I understand your Honor, not in connec-

tion with-

The Court: Have it taken both ways. Have [fol. 652] it taken by way of a weighted vote in accordance with your by-laws and have it taken on a pure numerical basis, without the weighting.

Mr. Dean: As I understand it, that would be for the in-

formation of the Court?

The Court: For the information of the Court, yes.

Mr. Dean: I see no objection to our doing that.

The Court: All right.

Mr. Dean: I might complete this schedule, your Honor. The Court: Go ahead, don't let me interrupt you, be-

cause I want you to keep on your notes.

Mr. Dean: We think it is possible to complete these formal proceedings in about 60 days, and with the problem of printing time and mailing, it would take about 75 days.

Assuming again that the order is approved, and assuming that the members approve the appropriate articles of association, and we so notify the Court, let us assume an effective date of the order of January 15, 1960. Then the following steps would have to be taken before we could [fol. 653] elect the directors: First, each member should then be sent a notification as to the number of votes he would be permitted to cast at the election, and the total number of eligible votes of all members.

Second, if anybody wanted to take advantage of the nominating committees that would have to be appointed to nominate candidates and an opportunity would have to be given pursuant to Section IV(D) for any group of 25 members to nominate a candidate, then I would think that these members who wanted to nominate a candidate should be given, say, 60 days during which time they could attempt to elect one or more directors by a petition of one-twelfth of the eligible writer or publisher votes.

Section IV(E) requires a 90-day interval between the final date to elect directors by petition and the actual voting

ing for directors.

Now, let me point out that the votes would be based on performance credits during the latest available fiscal survey year, so that prior to July, 1960, the latest available performance credit figures would be for the year ending September 30, 1958.

[fol. 654] The votes based on credits for the year ending September 30, 1959, will be available in July 1960. Now, it was for these reasons that we had suggested that the election of directors take place early in 1961, and the members could be advised of their respective numbers of votes in July, 1960. They could have until October to elect by petition. Then the general election would follow in 90 days thereafter.

If it were agreeable to your Honor to take the figures for the period September 30, 1957, we could accelerate this procedure. But we thought that you preferred to have it for the latest available date, which would be September 30, 1959, until some time in July 1960.

If you wanted to do it on the performance credits for the year ending September 30, 1958, rather than on the performance credits ending September 30, 1959, we could step up this procedure, and as to that we are entirely agreeable.

The Court: It is more desirable to step it up. Mr. Dean: As to that, we are quite agreeable.

[fol. 655] The Court: All right.

Mr. Dean: In his outline, Mr. O'Donnell discussed radio network sustaining and television network sustaining programs. He quite correctly stated that ASCAP would discontinue its complete census of the radio network sustaining programs. The reason that we are doing this is solely on the basis that the cost seems disproportionate to the revenue attributed to those programs. Even more important, ASCAP has no way of knowing how many stations carry radio network sustaining programs. It is our understanding, and we have checked this, that there is no requirement in the radio network that a member carry that sustaining program, and, in fact, we know that some of them do not, and put on programs of their own.

That does not mean that this census will not make the appropriate sampling of these radio networks sustaining programs. They will be taken care of in the sampling of the local radios, and they will be checked against appropriate publications and will be checked against appropriate logging, and that can be worked out again by experience.

The survey will continue the 100 per cent census of tele-[fol. 656] vision network sustaining programs, because they are economically very valuable and, further, the television networks supply ASCAP with the information as to the number of stations carrying each program. This makes it possible to compute the proper performance credits.

It has been stated here that in 1951 the 60 per cent Sustaining Performance Fund was split, and that the 30 per cent Availability Fund was split without the knowledge of the Department of Justice. The fact is that this change was discussed at length with the Department of Justice before it was adopted by ASCAP, and I believe that Mr. O'Donnell will verify this fact. No changes—and I want to emphasize that—no changes were made in the distribution formulae after the 1950 amended consent decree without prior notice to the Department of Justice.

Let me turn for the moment to the four writers' funds. It has been said here that only 20 per cent of the money under the proposed four funds system would be distributed on the basis of performance. On the contrary, a hundred per cent of the money will be distributed on the basis of [fol. 657] performance. 20 per cent will be distributed on the basis of current performance in the last fiscal survey year. 30 per cent will be distributed on the basis of the average performance over the past five years.

The former members option of five or ten has been limited to five, and there have been quite material changes so that younger writers are coming up faster, and as Mr. Lopez and Mr. Battle commented to you this morning, in the interests of what we believe to be the interest of writers and the Society generally, we have taken off some of the brakes on the deceleration of performance credits of people who wrote music many years ago, but who have not had

performance credits within the last five years.

30 per cent will be distributed on the basis of the average performances of recognized works over the past five years. The definition of a recognized work, something that had to be performed within a year after its first performance, is to get rid of those works that are plugged and have no real survival.

The reason for the five year average in this and the [fol. 658] previous fund is merely to level out the peaks and valleys of income.

There is a 20 per cent membership continuity fund, that is based on a five year average performance multiplied by length of membership with a maximum limit of 42.

We discussed at length with the Department this provision of the writers distribution formula that permitted writers to receive payment for a period of years from the availability and accumulated earning funds on the basis of the past popularity of their catalogs. Even though their works were receiving few or no current performances. The Department argued that the existing brakes which limit the rate at which writers distribution can decline add in the Department's opinion a very real anticompetitive effect of diminishing the money available to young writers.

It might possibly discourage them from entering the music writing profession or their inability to increase their income even though their music was popular at a sufficiently rapid rate might cause them to leave this field and to go into other fields.

[fol. 659] The present system was referred to by some of today's speakers as a pension. It was never that. As your Honor is well aware, there is just so much money received by ASCAP after the deduction of expenses which can be distributed. The question that confronted us in working out this proposed decree with the Department was this:

Could ASCAP continue to restrain the acceleration of these current payments to younger writers and at the same time continue the payments to all the members on a basis which included performances of several years ago, when they had not had recent performances? The Department argued that it could not and in fact held out strenuously for taking out these provisions entirely.

Your Honor heard speakers today on both sides of this question. Admittedly this is a very difficult question. We discussed this with numerous writers. We discussed it with committees of writers. We discussed it many, many times

with the board of directors.

Finally, we agreed in the proposed consent order that after a transition period of three years—that is in here so [fol. 660] that people can make some adjustment—that no money will be paid on the basis of performances other than those of the five latest years.

So that for the members that Mr. Eastman was talking about, namely, those members who had no work performed during the preceding five years under the proposed order, their distribution would be zero times their length of membership, and they would get zero dollars. That is what Mr. Lopez was objecting to and what Mr. Battle was objecting to. So only if they have performances could members get money from this fund or from any of the other funds.

Let me turn briefly to this current performance option. Again, this was one of the most difficult problems that we faced, and we spent many hours and days discussing this with the Department of Justice. The Department felt that many younger writers were not being paid for their works

which were current, and some writers felt that although they found merit in the averaging of their performances, they found merit in the recognized works fund and they found merit in the continuity of membership fund, they [fol. 661] nevertheless felt that they ought to have the right if they so wished to get paid 100 per cent on the basis of the current performance fund, and that the younger writers ought not to be required to wait until they have become a so-called old or middle member.

[fol. 662] It has been stated here today that this current performance option, which we thought was very constructive and we felt very proud of being able to work out that provision with the Department of Justice, is not attractive because those who elect to be paid on the percentage of the ASCAP revenue represented by the percentage of their current performances would not share in the money which the top 100 writers leave in the Average Performance Fund by reason of the diminishing credits that go to the top writers above 39,000, would not share in the Recognized Works Fund, and the Membership Continuity Fund.

Because these recognized writers firmly believe in ASCAP, because many of them went through a long and lean period when they were trying to get ASCAP established and when they had hard personal times when they went through long periods of litigation, and because they had believed in ASCAP, believed very strongly in the fact of this diminishing credits theory for the older writers above the 39,000 credits, and because every writer, as I understand it, even though he has been writing successfully for some period of time, always had the haunting fear [fol. 663] that some day he will wake up and his creative ability will leave him or that it will leave him for some period of time or that public tastes will change anthle will no longer be able to write things which are popular with the public-it is my understanding that that is the sort of haunting fear or the basic fear of all creative writers—the older writers, having been through this rather tough period. worked out this theory of diminishing returns and the averaging of the performances.

Again this is a question of what is fair and equitable for all of the members, and this will have to be submitted, if

your Honor'approves the order, to the members of ASCAP.

But it hardly seems to me that, if somebody wishes to elect to take all of their own performances on a current performance basis pursuant to this option which has been worked out, they can object if the other members, with all of the facts before them, vote that they want their money distributed on the four funds basis with the flowdown from the performance credits of the older writers on this diminishing credit formula.

In other words, the Department and ourselves felt that [fol. 664] we were giving something to the younger members which they wanted, and the objection now seems to be that: Yes, you have given it to us but we would like to have our cake and eat it, too. What we really would like is to be in the position of having a hundred per cent of our own current performances but we would also like a share in the averaging of the four funds. That, I submit, is mathe-

matically impossible to work out.

Now let me turn briefly to this question of recognized works. It has been agreed here that a song like "Old Man River" or any recognized work that has established itself in the hearts of the public so that when it is played by the . licensee on the program it breaks through to the public and so the public immediately recognizes it and stays with that program or else turns to that program—the licensee has the right to use as much or as little of the ASCAP repertory in his program in selling automobiles or lipstick or what have you as he pleases, and the licensees tell us in our negotiations with them that these recognized songs are the things that enable them to get the public to listen to their [fol. 665] programs, and they tell us that although younger people may in some instances like the ultra modern jazz or the ultra modern rock and roll the people to whom they are addressing themselves, who are presumably adults who are earning or have saved a little money want them to play the songs that were popular when those people-were married or when they were young so there will be some kind of an appeal in the program, and it is that kind of a song in our catalog for which they are paying.

I have been into this question and I have listened to arguments on both sides of this question for literally hundreds

and hundreds of hours. I have tried my best to examine all sides of this question of whether there ought to be any distinction between a recognized song and a song that has just been written, and I have come to the conclusion that ASCAP is correct in making the distinction with respect to 30 per cent of the money distributed to the Recognized Works Fund between those works which exhibit audience demand and have survived the so-called initial plug period and as indicated by the fact that they continue to be played more than a year after the first performance and the transifol. 666] tory hits which do not last a year and consequently do not share in this fund.

I think I have heard more criticism from those who think the established works are not paid enough than from those who think that their admittedly greater value shouldn't be recognized at all, and again that is a question of the balancing of the equities, in trying to work out something here that is equitable and fair and is not anti-social from the standpoint of society or at least does not violate the com-

petitive features of the antitrust laws.

As has been stated here and as your Honor is well aware, 50 per cent of ASCAP's revenues go to the writers, 50 per cent go to the publishers, and of the 24 member board 12 are elected by the writers and 12 are elected by the publishers.

This fact seems to have been ignored in a good many of the statements here. So that when the entire ASCAP board, that seems to be broadly representative, has been referred to constantly as a dominant board, referring entirely to the percentages of the publishers, it is as though the 12 writer members of the board were ciphers and as though they could be completely and totally ignored.

[fol. 667] Again the figures of all these publishers have been lumped together as though they were a unit, whereas actually they are in rather stiff competition with each other.

I would also like to call the attention of the Court to the fact that three of the publisher directors—that is, Johnny Marks, Irving Caesar and Adolph Vogel—are small publishers. This is indicated by the fact that they would have only between three and six votes under the proposed voting system. Three of the directors are medium sized and not

large publishers. They would have between 21 and 43 votes under the new system.

The writer members with the small and medium sized publishers on the board together represent, if I may aggregate them, 75 per cent of the votes on the board of directors.

Under the proposed new order no one publisher or group of affiliated publishers would have more than about 11 per cent of the votes, and I know of no presumption which can be indulged in that some 10 or 12 separate groups of publishers, each with different and diverse interests, constitute [fol. 668] a single unified group. Yet it is only on this assumption, it is only by lumping all these diverse publishers together, that you can assume that there is a so-called controlling group which would have as much as 30 per cent of the publisher votes.

Again on this question of amending the Articles of Association, in the statements that were made here the votes of the writers were ignored. Let me call your Honor's attention to the exact provisions of the Articles of Association.

tion. It is a rather complicated formula.

The formula, as set forth in the Articles of Association for amendment requires two-thirds of the average of (1) the total available writer votes and (2) the total available publisher votes, and in this detailed formula you take the percentage of the available writer votes which are voted in favor of the amendment and the percentage of the total available publisher votes which are voted in favor of the amendment, and unless the average of these two percentages, that is, the writer percentage and the publisher percentage, is 66% per cent the proposed amendment will fail. I just don't see what the basis is for assuming that any group of publishers could control this entire writer-publisher vote. On the contrary, I think it is very plain that the necessary amendments to the Articles of Association must represent general membership approval or the amendment cannot be adopted.

Again on this question of voting, I gather this is a very difficult subject and this again is a subject which required many hours of discussion with the Department of Justice and, as I am sure your Honor is well aware, many hours

of difficult negotiation on the part of all counsel with the publishers in an effort to get them to agree to these very real reductions.

The top ten publishers and their affiliates would be reduced from about 63 per cent to about 37 per cent of the total publisher votes, and the publishers affiliated with board members would have their voting strength reduced from about 56 per cent to about 30 per cent of the publisher votes.

It has been argued here that those who make the greatest contribution to ASCAP in the form of catalogs which they [fol. 670] contribute should not have the power to elect a board of directors. Nevertheless it has also been agreed that those who make the least contribution to ASCAP should not be in control. However, it has also been suggested that the Court should make the voting power of the members academic by transferring the management of the Society to some third party beyond the control of the members.

The Court: You don't have to worry about that. I don't think that it is any part of the Court's duty or obligation. I am opposed to unnecessary judicial intervention and judicial supervision with any business enterprise.

Mr. Dean: Thank you, your Honor.

. I might just conclude these publisher figures. Using the 1957 performance credits as an example, and these publisher figures have not been computed for later years, and applying the new formula in the proposed order the 73 per cent of all publisher members who together had only 3.9 per cent of the performance credits would get 13.13 per cent of the votes or three times their contributions to ASCAP.

Now on the writers side I might say they are always a [fof. 671] year later than the publisher figures, and the reason for that is that the writers like to have a year elapse so that each quarterly payment is even, and the publishers don't care about that so they get paid earlier. But taking the 1956 performance credits with the votes calculated on the proposed new voting system the result would be that the top 86 writers who had 49.3 per cent of the performance credits would have only 23.6 per cent of the votes, and some

2108 members with only 2.1 per cent of the performance credits would have 11.3 per cent of the votes or over five times as much as they would have on a formula which took into account only their contribution to the ASCAP reportory.

Again it seems to me that members with few performance credits both on the writers side and on the publishers side could use the petition system, and I have outlined here how we plan to give them the information so that they can

organize to elect directors to the board.

It has been said here that people will be afraid to sign such petitions. Well, I would like to state to your Honor [fol. 672] that we will arrange for these members who wish to get up such a petition to sign it secretly, and the ASCAP board will have it examined by an independent board of auditors without indicating the names to the ASCAP direc-

tors so that there won't be any fear of reprisal.

I think that is unjustified anyhow, but it seemed to me that that proposal ought to satisfy anyone on that point. [fol. 673] I just couldn't follow Mr. Horsky's statistics. They seem to have been taken from my speech, but it seemed to me that there is a good deal of confusion between the top ten groups of affiliated publishers on the one hand and the publishers represented on the board on the other hand, and it seemed to me that the votes which either group would have under the new formula are greatly exaggerated. One theory may be that they added to the board of directors the votes of Irving Berlin, Inc. and some other top publishers who were not on the board of directors.

One of the assumptions that was made here seems to be that the records were not properly kept. I would like to say that in working out this decree with the government we have tried, in addition to the visitorial powers of the Department of Justice, to work out provisions here which make it very clear that a member has the right to inspect the records of ASCAP in so far as he has a legitimate interest in them. We will set up this new classification committee which will be quite different from the board of directors and we will have these appeals to the American

Arbitration Association. We will make the records available and we will give them copies of the transcripts.

[fol. 674] It seems to me that Mr. Horsky in his presentation had the survey backwards. It will be the Joel Dean Associates who will decide on the depth of the sampling and who will decide on what is to be sampled. And while the people in ASCAP, as has been said, are not necessarily trained as musicians, nevertheless they are highly trained in listening.

It is a curious thing. We discover that sometimes the abler the musician the less he can listen to music that he does not like. He gets irritated and he slams down his earphones or he refuses to listen or he exclaims that that is not music. But we have trained these girls so that we think they do a very creditable job of listening.

But again we think that both the Joel Dean Associates and this independent expert that the Court has the right to appoint would certainly have the right either themselves to make the correction or to report to the Court if the listening to these tapes or the checking of these logs is not done

on a highly efficient and proper basis.

As the Court's order recites, one of the very purposes of this survey is to cut down the percentage of non-iden-[fol. 675] tification, and the order itself sets out the basic design of the survey. Certainly Joel Dean Associates is going to have all the power they need to make sure that this is a completely honest and completely efficient survey.

It has been suggested that the employees of ASCAP working on these matters should be fired and that we should go out and get a completely independent agency. I don't know of any such independent agency. In all my investigations I have never found one. Further, this independent

agency would not be responsible to the board.

In his presentation Mr. Horsky's heart also seemed to bleed on behalf of the radio and television licensees. He seemed to feel that ASCAP was getting entirely too much money out of these radio and television licensees, and that is one of the reasons why ASCAP ought not to be in control of its own affairs. Well, I wonder just how the members of ASCAP feel about that suggestion.

It seems to me that ASCAP as a Society acting through the board of directors ought not to be deprived of the services of those who have the greatest stake in ASCAP by contributing their catalogs in carrying on these negotia-[fol. 676] tions. It seems to me that this question of records can be amply taken care of in the provisions we worked out with the Department of Justice in the survey.

[fol. 677] Now, let me turn to this question of foreign revenues. It is my understanding that for the last available period the total amount receivable from Sweden is \$100,000. There has never been any attempt by the Swedish Society to distribute that directly to her members that I am aware of.

am aware or.

Let me call your Honor's attention to the fact that any inember of ASCAP can license any foreign society directly if he so wishes.

The Court: I am not concerned so much with that foreign

provision, that does not trouble me.

Mr. Dean: I won't labor that further.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: I will tell you, Mr. Dean, what does bother me, and it has bothered me from the very beginning, and that is not a matter of judicial protocol but a matter of common sense approach to this whole thing. I have before

me a proposed amendment to a consent decree.

The proposal itself is supposed to be before me on consent and yet when I inquire into it, it is not before me on consent. Therefore, I wonder whether at this time I can act upon what is before me. Everybody who has spoken here has represented that he is a member of ASCAP. Apple [fol. 678] parently, all of the opposition springs from within the membership itself, all that has been expressed here today.

I feel very frankly that while I must pay great respect to the recommendation of the Attorney General in charge of the Antitrust Division and his judgment is entitled to great respect in these matters, in which he has an expertise, and while I am personally impressed with your desire to be fair, and although you function as counsel for the Society I think you have approached the whole matter with a very broad and businesslike point of view, still I don't think that at this stage I should begin to analyze this decree until it

has first been voted upon by the membership.

I have been reading the transcript of the hearings before the Congressional Subcommittee No. 5, and I have a memorandum—I don't believe it is confidential—submitted by the staff of that committee to its chairman, Congressman Roosevelt, in which the staff has made a study of this decree. I gather that is their view, as indeed it is my own in substance, although this proposal which is now before me is not perfect, it is at least a substantial improvement upon present conditions, it does not foreclose [fol. 679] further steps to accomplish and achieve further improvements when they appear to be either necessary or desirable. It permits of further study of the situation.

As I read this report or this memorandum to Congressman Roosevelt, I agree with many of the observations. For instance, there is an observation speaking of the problem of the weighted voting system that the proposed decree deals with this problem and contains provisions which will require important changes in voting procedures, without doubt these changes will improve the situation. I agree with that. That is my reaction, expressed in terms as I

would express them myself.

Then, with reference to the performance survey and the logging system, I think the proposed survey and logging system is an improvement of what is presently in force and effect. It is noted that the Antitrust Division has reserved the right to ask the Court at a later date to require changes of improvements in the survey procedures. Accordingly, further improvements should be required if found desirable. We can only find out if they are desirable by testing out these surveys as now proposed and the logging systems as now proposed.

With reference to the distribution formula set forth in [fol. 680] this new proposal, it is an observation that I prescribe to, and it is my own reaction, this is the first time I have read this. Apparently, my line of thought goes along identically with this, although I have never seen it before. It came in, I think, yesterday and my secretary

had it and tried to give it to me three or four times, but I had to read too many other things and I did not have time to get to this. But there is a further observation with reference to this distribution fund. It says, "The decree now being proposed seeks to overcome a number of the objections outlined above. It appears doubtful that it will bring a necessary degree of relief."

I don't know whether it will or not either, but at least it is a step forward and let us try it out and see if it does or not. We are not precluded from asking for further

changes.

Speaking of this seniority or old time sentimental care custom, which traditionally has been one of the boasts of the stage, they take care of their own—for years back, we had the old Percy Williams Home, we had the Will Rogers Home at Saranac Lake, we had the Actors Fund for years, and this is a profession that has been known to [fol. 681] make extraordinary efforts to take care of its old members. There is really more than a professional bond that exists among them. I often pray we had that amongst the Bar, but we don't. However, these people of the theatrical world, they have a dedication to one another and an interest in one another, which I think is remarkable and very commendable. This seniority fund seems to be in line, as far as I have been able to observe, with their fine and commendable traits and traditions.

I for one would not want to see it wiped out entirely. They speak of that. The proposed decree is an improvement, but its adequacy appears to be subject to question. I don't doubt that, but it is an improvement, let us have it. Let us try it out. Speaking of the grievance procedures and availability of records, this reads, "The proposed decree would seem to bring about substantial improvement in this situation."

I personally think it would. I don't think it is perfect. I am inclined to say that we should try it out. It goes on further with respect to the grievance procedures and availability of records, and makes the observation that "This portion of the proposed decree contains important provisions, important improvements, relief to the oppressed [fol. 682] members, therefore, is to be expected."

That is my reaction. It is not perfect. Nothing of human creation can be perfect in the true sense of the word. We

have to try it out. .

Finally, in the conclusion, I read this one sentence, and I don't think I am picking the sentence out of context in the light of the remarks I made about them. "If the proposed decree in its present form is approved, the Society will be compelled to make some changes, but it is believed that more are needed."

Perhaps more are needed. Let us try out these, at least we get a step forward. My reaction is, and while this proposed-I cannot call it a proposed consent decree, because it is not that, it seems to me to be a step forward. It seems to me to be an improvement in present conditions. For that reason I would be inclined to give it my detailed approval after I had studied and after I had written on the subjects and on the provisions. Frankly, I don't feel that I should write an opinion or make a detailed study on where there is essentially a purely hypothetical proposition. And that is what this whole proceeding is. What I have in mind , is this: Adjourn this hearing. Take your vote amongst your members. Come back here and let me know what their [fol. 683] vote is. Then I am acting on a situation where you can stand before me and say, "I join with the Attorney General and on behalf of the Society I do consent to this decree and to these modifications." You don't take that position and you cannot do that today.

What you are asking me to do, and perhaps it is just as well that you have asked me, because I believe that a public airing of these things prior to the vote is sometimes conducive to a better understanding and a better appreciation of what is involved, but I don't feel I should at this time say I approve of this and wrote a long dissertation or opinion on something which is subject to ratification by your

own clients at a subsequent date.

I suggest, and I think the procedure to be followed is that we adjourn this hearing until some time you feel you can hold this meeting, come back on that day and tell me that you either do consent or you regret but you cannot consent, because your Society is authorized or not authorized to do so, as the case may be.

Mr. O'Donnell: That is satisfactory to us, your Honor.

The Court: I don't, when I make that statement, want to appear to be standing on judicial prerogatives. I am not. [fol. 684] I am trying to approach this as a practical matter. I think this is a serious social problem. What are we going to do with these copyrighted works and productions?

The men who have produced them are entitled to be paid for their use. I don't know of any other system other than a pooling of these things as we have here in ASCAP, that can be made workable in our system of society. Unless you have some kind, as I commented the other day, some kind of compulsory licensing on a specific royalty basis, as you have in phonographs. I don't know how these authors could collect otherwise.

Mr. Dean: Could I think out loud with your Honor here

a minute?

The Court: That is what you are supposed to do. I think everyone has been frank, I have been frank, and although I have quipped with various lawyers, I have done so primarily in the spirit of trying to get cooperation.

You have a serious problem. It does not affect my pocketbook—indirectly perhaps it does, but directly it is affecting the pocketbooks of these men who make this their liveli-

hood.

God knows, where would we be in this world if we wiped [fol. 685] out our music and musicians? Everybody's idea of what music is differs, but if we wipe out music from our lives it would be a sad world. I sometimes think that the old days, when we had a band playing in every village green, when we had the old brass band walking at the head of May parties, that those were the real days, when we really had something.

As you get older, you like to live in the past. Your memories of the past come to mind, but I don't like to think of the future, of our future, of having a future without music.

Think out loud and let me hear what your thoughts are. Mr. Dean: There are several problems, your Honor. Your Honor knows from what has been said here and from Mr. Lopez's letter that you have the problem of estates and you have the problem of distributing this income. We also have the problem, since ASCAP is a non-incorporated

association in New York, whether we can, so to speak, put up a tentative vote to our members.

The Court: It would be a definite vote either that you

do approve to the consent decree or you don't.

Mr. Dean: What I am driving at is this: Those opposed to the Society approving this consent order—and the [fol. 686] thought just occurred to me, perhaps it isn't so, I don't know—but they might be able to say to people, "Even if you vote for this, you don't know whether the Court is going to approve it."

The Court: You don't have to be a fortune teller to have the sense—excuse me, I shouldn't speak that way. You don't have to be a fortune teller to infer from my remarks

what my expected action might be in the future.

I am not binding myself, however. I am giving my present reaction. I don't know how I can do it any plainer than I have done.

Mr. Dean: I appreciate what your Honor has said and I fully appreciate that this is a very grave social problem and that we are dealing here with something that is terribly

important.

The Court: What is going to happen is this, as I see it, Mr. Dean, it has to happen: Either you are going to help the government clean house or you are going to get legislation that is going to clean it for you.

Mr. Dean & I agree with that.

The Court: It has to come that way. Your Society and its members are the ones to make the decision. Apparently, Congress is already watching the situation. All of these [fol. 687] hearings are supposed to be designed to aid in the promotion and consideration of legislation.

Mr. Dean: I think the hearings were very helpful to us. The Court: I have been impressed by them. They have shown weaknesses in your organization, they have shown some weaknesses in the administration. This decree pro-

poses to make some changes.

I think it is a step forward in the right direction. However, I am not going to give my final approval, and I am not going to consider it paragraph by paragraph or at length, on what is purely a hypothetical matter. I don't think I should be asked to. I think that this hearing has served a very good purpose. At least we have had an airing of views, they have now been publicly expressed. See what your members think of it. If you come back with their approval, we will be glad to hear, you on it, not again at this great length, of course.

Do you want a ten-minute recess to think it over?

Mr. Dean: Yes, your Honor.

The Court: All right, I will give everybody a ten-minute recess to think it over. If anybody wants to be heard, I will hear them.

[fol. 688] (Recess taken.)

The Court: Mr. Dean, Mr. Davis who is here feels that he was not adequately represented by what Mr. Battle said, and he asked to talk just for two minutes. Suppose we let Mr. Davis talk for two minutes. Is he here?

Mr. Davis: Yes.

The Court: You want to say something? Come right up, sir! Say what you have on your mind.

STATEMENT BY MR. DAVIS

Mr. Davis: I am a little nervous, I might need something to brace myself on.

The Court: I hope you don't brace yourself on anything

as fragile as glass.

Mr. Davis: No, sir. Not being represented by counsel, well, I am a good writer, maybe I should be in that big class that they keep talking about. I write that type of song, in fact, any kind of song I can write. I am merely

a songwriter.

· I have been attending meetings of the Society and I have never heard anyone come up with a suggestion of a compromise or a solution. It has always been criticism and this one calling that one a thief and back and forth and back and forth. That is all I have heard throughout my association with the Society.

[fol. 689] I feel this way about it: It is just a matter of dollars and cents. I can't see why it is so complicated.

I have worked out in no mind and some on paper somewhat of a solution. I have been told that something similar has been tried before. When I first became a member. of the Society, I think the revenues of the Society were between eventeen and twenty-three million dollars. Now it has reached more than twenty-eight million dollars a year. Well, this is merely a suggestion to the amendment that I would like to suggest to the Society to ponder over. [fol. 690] Why couldn't a million or five million or ten million or whatever per cent—I am not going too high, sir—be set aside as a fund to be distributed among all members on an equal basis? The fact is that the Society collects its money on a blanket basis. They have contracts with radio and with television, movies, theatres, set cetera, throughout the world.

Even when I was in La Tuque, Canada, a place that is not even in the world, it is so far out, the owner of the place told me—the fact is I am an entertainer, you know,—that he pays ASCAP \$600, and I was surprised that he even knew anything about ASCAP, he is so far out in the sticks.

The Court: Mr. Davis, you would make a good MC.

Mr. Davis: Thank you, your Honor. The fact is that the money is being paid on a blanket basis, and I am putting before the Chair as a suggestion to the board to ponder over to set aside some percentage of that money to be distributed on a blanket basis the same as they collect it on a blanket basis whether the songs are played or not.

[fol. 691] One of the attorneys got up here and struck on the edges of it. But whether the songs are played or not ASCAP collects its money. Now, whether my song is played or not, or whether a survey is taken of my song or not, I am a member of the Society. So, if the Society is going to collect this 28 million or maybe 30 million or 38 million in time—and it may even get to 58 million one of these days because time marches on, but I don't have to tell you that because you know that, and the membership will increase some. I figure, sir, within the next 20 years the membership probably will be around 10,000. We will assume that.

So you use a figure of five or a figure ten to distribute a certain portion of the money on a membership basis over a period of—if a member has been in the Society five years he collects from the Society from the five-year group, and if he has been in the society for ten years he collects from

the ten-year group whether his song has been played or not;

because he is still contributing.

The Court: I think there is something to your idea but I don't think you are going to have it work out. I would [fol. 692] like to apply for membership now in the Society.

Mr. Davis: Thank you, your Honor. I hope you will be

accepted.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Thank you.

Now let us get back to serious work here. If we don't have a laugh once in a while we will all be fighting with one another. Now let's get back to serious business.

Mr. Dean: Your Honor, I have conferred with my fellow counsel, Mr. Finkelstein and Mr. Cutler and Mr. Adams, the president, and your Honor's proposal is quite acceptable to us. However, there are one or two mechanical problems about it that I would like to point out to you.

In VII on page 15 of the proposed order-

The Court: Let's just get that and then we will read it out loud: But perhaps I should first ask you:

' Is anybody here present who feel that my proposal should

not be followed?

Mr. Horsky: I should like to endorse it, too, your Honor. However, I have a couple of suggestions to make when Mr. Dean gets through.

[fol. 693] The Court: Thank you very much.

Mr. O'Donnell: It is certainly acceptable to the Government.

The Court: Apparently then there is no opposition to it. That is one thing we all agree on now.

Suppose you read what you have in mind as you come

to these different subdivisions.

Mr. Dean: I want to make it clear that there are two alternative ways of doing this and I would like to get your Honor's suggestions or directions on it.

VII(A) on page 15 of the proposed order reads:

"ASCAP is ordered and directed within three months after the entry of this order to submit to its membership any portions of this order as to which the consent of

the membership is required by the Articles of Association of ASCAP, and the board of directors of ASCAP shall recommend to said members that said consent be given."

In accordance with our past practice, your Honor, it was not our intention to submit to the approval of the members [fol: 694] the entire consent order but only those portions of it that require the consent of the membership, and my first question is this:

This is a consent order subject to your Honor's approval and subject to the vote of the members to the Articles of Association that ASCAP and the Department of Justice have agreed on. But shall we proceed as we planned to proceed under Article VII of submitting those matters to the members for their votes required to amend the Articles of Association, or did your Honor have in mind that despite the fact that that is not necessary under the Articles of Association we should submit two things to the board:

(A) The formal approval of the Articles of Association as to which the vote of the membership is required by law and then, as an advisory vote to the board of directors, this whole consent order?

The Court: My idea was, based upon a famous expresion by a once famous president of our country, that open ovenants openly arrived at are productive of peace, and I yould suggest that the vote be taken on the entire proposed

fol. 695] Send a copy of it to the members and ask them ne simple question:

Do you approve of this decree or do you cast your vote favor of authorizing the Association to consent to this

While individual members may have objection to one articular subdivision of the decree they may feel that hers are advantageous and desirable and that on an overl basis they will take the bad with the good to accomplish overall improvement. That would be my idea.

Mr. Dean: That is quite acceptable to us, your Honor.

The Court: Just make it a simple notice:

Here is a copy of what we ask you to vote on. Have we your consent or haven't we?

Mr. Dean: We would like to submit it, then.

The Court: Have you any views to the contrary?

Mr. Dean: No, sir, but I just want to make-

The Court: May I ask is there anybody here who has any views to the contrary?

Mr. Fishbein, do you?

Mr. Fishbein: I do not. Mr. Eastman: I suggest, however, that we first have a statement approved by the Court as to what the membership is going to vote on.

The Court: They are going to vote on whether or not they shall authorize the Society to consent to the entry of

this proposed amended decree.

Don't have to write out a big proxy statement or registration statement of twenty pages.

Mr. Eastman: Just that one statement.

[fol. 697] The Court: Just a simple matter: Here is what we ask you to consider. Do you authorize the Society through its officers to give their consent or don't you?

Mr. Eastman: And that is without recommendation of

management, in other words, as a pure poll.

The Court: Wait now. Any fair statement by the management, so-called, can be sent as an independent communication just the same as any member of the committees which have been formed may themselves send anything they want to.

Mr. Eastman: That leads to the question now of how we conduct this poil. Should we have an independent agency conduct this poil? Obviously, if you have all the votes going to ASCAP, then they have an opportunity to ask the voters

to change the votes.

The Court: I will tell you what we will do. I have implicit faith and confidence in one of the members of the Bar here who is associated with ASCAP, Mr. Herman Finkelstein, and I would say have the envelopes addressed to him. Give him a Post Office box.

Would you accept that responsibility, Mr. Finkelstein!

Mr. Finkelstein: Yes, your Honor.

[fol. 698] Mr. Eastman: And, your Honor, Mr. Finkel-

stein, as I understand it, will hold that secretly—

The Court: He will rent a Post Office box to which these will be mailed. He will then have the key to that box. He will keep all of these votes. If you want them opened up here in court, I will accommodate you.

Mr. Eastman: No, no.

Mr. Evans: Yes, yes.

Mr. Freedman: Yes, yes.

Mr. Eastman: I have full confidence in Mr. Finkelstein.

The Court: I have absolute confidence in him. I have seen the way he has devoted himself to the interests of this Society, and I have found him in individual cases to be extremely fair, and I know that he has worked all hours of the day and night and he has tried to make me work the same hours of the day and night until I chased him out of chambers a couple of nights at half past 6 because I wanted to get home.

Mr. Eastman: Your Honor, as I understand it, we are

going to have rules about this poll, then?

The Court: We don't want to make it too complicated. Let's not be a group of lawyers. I would rather have the fol. 699] direct approach of Bob Davis.

Mr. Evans: Good.

Mr. Eastman: Our committee, for example, would like o communicate with the members of ASCAP.

The Court: You communicate with anybody you want to by separate letter. Only make sure that your letter fairly

tates your position.

Mr. Eastman: We require for that a list of all the memers and their addresses, your Honor, which I think should a furnished to us as soon as possible.

The Court: What about that?

Mr. Dean: We will be glad to forward anybody's material the sealed envelopes to our list of members with affiwits that we have done so.

Mr. Eastman: We don't want it forwarded, your Honor. e would like to send it directly. We are members of the sociation, your Honor.

The Court: Wait a minute. Wait a minute. We will have affidavit by brother Finkelstein that he supervised this.

You can get your letters ready. They will address them free of charge. I cannot make them pay the expense of it, but I will ask them to address those letters free of charge and give me an affidavit filed in the court that they have mailed them.

[fol. 700] Mr. Finkelstein: We can go beyond that, your Honor. They may watch the Addressograph addressing all

the envelopes and see that everything goes out.

Mr. Eastman: This proposed order provides for the listing being furnished. Why can't we start this democratic process by having it now?

The Court: Having what now?

Mr. Eastman: By having a list of all the members and their addresses.

The Court: I will tell you why, very frankly. You have some competitors in the field that might want your lists, and I wouldn't, for the protection of the Society and its members, make those lists public. I don't think it would be right. It is like a trade list of a business.

What is on your mind, sir?

Mr. Freedman: There is just one question, your Honor.

The Court: Of course you have a very able lawyer standing there.

Mr. Freedman: He does not represent me, sir.

The Court: Then that is your misfortune.

Mr. Freedman: I recognize that. There is prevalent among the members of the Society the fear of not voting [fol. 701] along with what the board would like it to vote for. I merely mention this because this has happened in the past, and we have had direct experience with this.

The Court: I am not going to stop anybody in this Association, either the board or anybody else, from sending out separate literature urging that one position or another be taken. That is done in every proxy fight, it is done in

every business venture that we have today.

Mr. Dean: Before Mr. Horsky speaks may I just raise two more questions?

The Court: Yes, sir.

Mr. Dean: On this voting your Honor has also suggested that we have a poll of the individual votes, and it is quite acceptable but I assume that the voting—

The Court: When you tabulate these votes, first you will have them by number and then you will rate them. Of course from that list you will apply your rating. So you will have two ways of voting.

Mr. Dean: That is what I wanted to ask.

The Court: You will have two ways of voting-not of voting. You will have one way of voting and two ways of counting the votes, one on a purely numerical basis and the [fol. 702] other on a weighted basis.

Mr. Dean: 1 want to call your Honor's attention to the fact that prior to the time of the amendment we would, of course, have had to submit the proposed consent order and have that voted on and the Articles of Association in accordance with the weighted vote which is presently in our Articles of Association.

The Court: You do it any way you want to as long as it

goes out to the membership at large.

Mr. Dean: One more thing and I am through, your Honor. Since we have agreed upon this consent degree with the Department of Justice it is implicit in our consent that we submit this proposed decree and nothing else.

The Court: That is all. Mr. Dean: Thank you.

The Court: That is all. That is the way I understand it. res, Mr. Horsky?

Mr. Horsky: I have just a couple of suggestions, your fonor.

The Court: All right.

Mr. Horsky: First, it seemed to me that in view of the act that this is a question which is being submitted to the embers of the Association at the suggestion of the Court fol. 703] for their vote it would only be appropriate that e Association pay the expenses of an equivalent amount literature which may be distributed by members who do ot believe this decree should be approved.

The Court: The trouble is this. I don't suppose it mounts to too much money.

Mr. Horsky: It does on our side. That is the trouble. The Court: We have had here 12 people speak. Who is ing to get this money? You are not going to have the sociation pay for 12 different circularizations, are you?

Mr. Horsky: No.) We ought to be able to agree on who is going to send it.

The Court: If you can all agree, all 12 who have been here today or yesterday, and if the expense does not run too much—show much do you expect the expense would be?

Mr. Horky: No more than that spent by the directors. We would not want to make it any more than they would spend.

The Court: We don't want this business of telephone solicitation and all that, you know, like they do in proxy

fights.

[fol. 704] Mr. Horsky: I would like to have it on an equal basis.

The Court: 64 times 4 cents would be \$256 for postage. I suppose it would be fair to say that to send out a circular letter would cost maybe 10 to 12 cents, not more than a thousand dollars. I think that would be fair. The Association could afford that.

Mr. Horsky: That's right.

Mr. Dean: That is agreeable to us, your Honor, provided—

The Court: Provided you agree on one letter or one group to send out one letter. I think that is fair. I have no power to order that, but I suggest that to Mr. Dean,

Mr. Dean: That is acceptable to us, your Honor.

The Court: Not to exceed \$1,000.

Mr. Dean: One letter.

The Court: One circularization.

Mr. Horsky: It seems to me also, your Honor, if I may re-raise a question on which you have already indicated an opinion, that it should be possible for the membership to know the addresses of the people who are going to vote. The directors know. They have it in their possession.

[fol. 705] The Court: No. I am not going to make public a list of the membership at large. I don't think it is desirable.

Mr. Horsky: The order does it, sir, if it is approved.

The Court: We will take care of that later on, I don't think it is desirable at this time. I have entrusted this work to Mr. Finkelstein. I have implicit faith in him both as a man and as a member of the Bar. He will see to it that your letters are run off on the Addressograph machine. You can have somebody there when it is done.

Mr. Horsky: I am not challenging that.

The Court: You can, and you can accompany him, or somebody else, with those letters to the Post Office to see that they are deposited in the mail.

Mr. Horsky: Let me suggest to you the difficulty I see in

this.

The Court: The difficulty that I see is that there are competitors of ASCAP, and what you are asking for at this time is a publication of a confidential list which may result in their harm and damage. It will not work out, and you must remember too, that I have no power at this time to [fol. 706] direct that these steps be taken.

Mr. Horsky: I understand that.

The Court: I am simply suggesting it, and the Society, represented by Mr. Dean, is accepting my suggestion.

Mr. Horsky: May we then have the power to examine

the nrembership list at the ASCAP office?

The Court: No. I would not permit that at this time.

Mr. Horsky: Isn't that unfair, your Honor?

The Court: No. I don't like that expression, and that is something that just rubs me the wrong way.

Mr. Horsky: I am sorry.

The Court: I try to be exceptionally fair. I have no interest in this business. I have nobody connected with me in the remotest degree who has any copyrighted songs, any interest in any music publication society or company or corporation. I am trying to look at this from an impartial point of view. At the same time I am trying to protect the members of the Society.

I realize my limitations here. I have no power at this time to direct these things. I am simply asking that it be done, and I am very happy that I am getting the cooperation that

I really feel I should get.

[fol. 707] Mr. Horsky: Fine.

The Court: And I know that I will get the same from you, too.

Mr. Horsky: Thank you, sir. You certainly will.

One more point. There are two types of votes which will

result from this. One will be the weighted vote and one will

be the non-weighted vote.

The Court: It will ultimately be that way, but there will be one vote that comes in from the members, for or against. They will be tabulated first on a purely numerical basis. Then they will be tabulated on the weighted basis. So there will be one vote with two calculations made from the one set of returns. That is what I contemplate.

Mr. Dean: Technically, your Honor, there will be three—Mr. Horsky: Pardon me. I wanted to ask the Judge.

May I continue with that question, sir?

The Court: There will be really four because there will be one for the writers, one for the publishers.

Mr. Dean: And one to amend the Articles of Association.

The Court: All right.

[fol. 708] Mr. Horsky: The problem, your Honor, arises from the fact that a publisher sometimes consists of a group of affiliated companies which in effect would give some publishers a weighted vote if you counted each of the affiliates.

The by-laws of the Association do not permit any single representative of a group of affiliated publishers more than one member to serve on the board of directors and I think that same affiliation limitation should apply to the non-weighted vote.

The Court: No, I am not going to do that. I am not going to ask them to do that. I want to find out how many of these 6,400 members are in favor of this and how many are opposed. Then I want also to know what the weighted vote is in favor and what it is against.

I think that is about all you can ask here, and I think if you ask more you might get less. So you had better leave it go in this way. I think you have done very well, Mr. Horsky. You got \$1,000 to send out the circular, and Mr. Finkelstein will be supervising it personally, and you will be assured of a fair shake from him, in plain language, and I have great faith in him, implicit faith in him.

Mr. Eastman: There is a sharp distinction between a [fol. 709] publisher and a writer and I would like to amend that suggestion to submit to the writer a separate com-

munication.

The Court: No. We will send out one communication to both. Don't make it too complicated. That is one of the lawyer's faults.

All right, now, Mr. Dean, have you anything to say?

Mr. Dean: Nothing further.

The Court: The next point is when can you send this out and when will you hold your meeting and when do you want me to say come back here and let me see you get it? Or do you want to hold that in abeyance? I think it would be best if everybody knows when this thing is going to start rolling.

Mr. Dean: On the basis of the September 30, 1957, figures I would think, subject to correction from Mr. Finkelstein,

that we could do this within two weeks.

Mr. Finkelstein: No.

The Court: More than that?

Mr. Finkelstein: The members have 20 days—the ballot has to be in the mail for 20 days.

Mr. Dean: I am talking about sending it out.

The Court: To get the thing moving.

[fol. 710] Mr. Finkelstein: We have to have two meetings, one in California and one here, to discuss it.

Mr. Dean: That's right.

When could we put this in the mail? Mr. Finkelstein: Two weeks easily.

[fol. 711] Mr. Dean: That is my first question. My second question is when can you hold your Los Angeles meeting

and when your New York meeting.

Mr. Stanley Adams: That would depend a great deal upon our ability to get a reservation at one of the hotels because they are booked quite a bit in advance. I would not at the present moment be able to tell you. I can tell you after exploration tomorrow or the next day.

Mr. Dean: When would you contemplate actually holding

the members' meeting, the date of the meeting?

Mr. Adams: I would say the West Coast meeting should be within the next three weeks, as an outside figure, and the East Coast meeting should be a week later.

The Court: All right.

Mr. Eastman: May I inquire what the purpose of this meeting is?

The Court: To comply with the by-laws. The by-laws say that on any vote of this type there must be a meeting in these two localities.

Is that correct, Mr. Finkelstein?

[fol. 712] Mr. Finkelstein: That is correct, sir.

The Court: That is my recollection.

Mr. Eastman: Are we to be confined to your Honor's suggestion that we simply have a statement of what the question is?

The Court: If you are a member you can go there to those meetings and make yourselves heard. If you cannot get yourself heard, you had better get hold of Brother Battle and he will battle his way in.

Mr. Battle: 'Certainly will, Judge.

. Mr. Dean: I think the answer to your Honor's question, then, is that we can hold these meetings within approximately six to seven weeks.

The Court: All right. Then you could come back hereit will have to be early in January, won't it?

Mr. Dean: Yes.

The Court: Do we have a calendar available?

How about January 6, Wednesday!

Mr. Dean: Agreeable to us, your Honor.

The Court: Does anybody have any objection to January 6th, Wednesday, at 10 o'clock?

Mr. Kaufman: Judge, one question, if I may.

At these meetings will counsel be permitted to be heard [fol. 713] in opposition to the decree?

The Court: You mean which meetings?

Mr. Kaufman: At these membership meetings.

The Court: I think you had better let the members do their own talking.

Mr. Kaufman: Except that the board will have their counsel address the members as they have in the past.

The Court: I think it would be better to let the members do their own talking. I am not going to undertake to permit the long series of speeches by lawyers. The members of this Society are not ignorant men by any means. They are business men. They are able to take care of themselves and express their ideas.

Mr. Kaufman: Will the Society at least permit us to be

present? They have excluded us in the past.

The Court: I think you are entitled to be present, yes. A lawyer is entitled to be present if he does not obstruct the meeting, but not to be heard. You certainly can go in there with your client. I don't see any objection to that. [fol. 714] Mr. Kaufman: Can we have that permission?

The Court: I would suggest that that be granted. Mr. Dean: That is agreeable to us, your Honor.

The Court: Maybe they will serve a little tea and sand-wiches.

All right. I would suggest that it be granted, but I don't think that we should turn this into a forum where forty different lawyers get up. That won't promote harmony. If any member wants to get up, he should be afforded a reasonable opportunity to do so.

Mr. Kaufman: I think we can agree on one to speak in opposition. Will that courtesy be extended to us?

The Court: I wouldn't say lawyers. I would prefer to keep the lawyers out of that meeting.

Mr. Kaufman: Supposing Mr. Dean addresses the meeting in favor. Shouldn't there be some opposition then?

The Court: I think Mr. Dean has a right to do that because he is the lawyer for the corporation. He is the lawyer for the Society.

[fol. 715] Mr. Kaufman: But we are all guilty of one thing here.

The Court: All I can do is make a suggestion. When you are getting something, don't look a gift horse too close in the mouth. He might bite you.

Is there anything else that you have, Mr. Dean?

Mr. Dean: Nothing further.

The Court: Is there anything that you have, Mr. O'Don-

Mr. O'Donnell: The Government appreciates the Court's patience and courtesy.

The Court: Does anybody else here have anything else to say? If you do, say it now or forever keep your silence.

Does anybody want to be heard? All right.

Mr. O'Donnell: May I change one position before the

record closes? .

Yesterday I advocated rather violently that the man who watches the survey should be a mathematician. I want to tell you that overnight we have been thinking about your [fol. 716] Honor's suggestion and we have now come around to the view that it would perhaps be better if he were a business man of experience or a lawyer, as the Court suggested.

The Court: All right. I have not spoken to either Senator Ives or Judge McGeehan, and they might both hit me on the head, but I have in mind men of that type who have public confidence and who I know are above reproach and

have a practical approach to all these things.

Mr. Eastman: Your Honor, I would just like to say that the writers committee wholeheartedly concurs with your suggestion of an overseer of the type mentioned. We are delighted with the suggestion.

Mr. Rothstein: I am not entirely clear on this, your Honor. Will voting by mail be permitted by those who do

not attend the meetings?

Mr. Dean: Yes:

The Court: This meeting that is held out West and back East is a meeting that is required to be held by the by-laws at which the members may be present to ask questions and express their views. Lawyers may not talk at that meeting but their clients may.

All right.

[fol. 717] I think for instance, the little paper that was read here from Mr. Lopez was very expressive of his views and his feelings.

You might prepare a similar paper for your client to

read, if you want.

Mr. Dean: May we thank your Honor for your patience. The Court: Thank you, gentlemen. I hope you all give this much thought. [fol. 718] [File endorsement omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER DENYING MOTION OF SAM FOX PUBLISHING Co. FOR LEAVE TO INTERVENE—November 16, 1959

Upon the motion for intervention of Sam Fox Publishing Company, Inc., Movietone Music Corporation, Pleasant Music Publishing Corporation, and Jefferson Music Company, Inc., dated October 13, 1959, the Pleading in Intervention submitted therewith, the Order of this Court dated June 29, 1959, together with the Proposed Consent Further Amended Final Judgment, the proposed Writers' Distribution Plan and the proposed Weighting Formula submitted therewith, the Amended Final Judgment entered March 14, 1950, and upon mailings to the membership of the American Society of Composers, Authors and Publishers dated July 10, 1959, July 21, 1959, August 26, 1959, September 4, 1959, October 5, 1959 and October 9, 1959, with proof of the service thereof; and

Having heard Charles A. Horsky, Esq., attorney for said applicants, in support of said motion pursuant to Federal Rule of Civil Procedure 24(a), subparagraph (2) or, in the alternative, pursuant to Rule 24(b), subparagraph (2): and as a friend of the court in opposition to the Proposed Consent Further Amended Final Judgment; and

Having heard Richard B. O'Donnell and Walter K. Bennett, attorneys for the plaintiff, and Arthur H. Dean, Esq., attorney for defendants in support of said Proposed Consent Further Amended Final Judgment; and

[fol. 719] Having found that representation of the public and the applicants by the Department of Justice was adequate and in the public interest; that applicants are members of and are represented by the Society with their consent; that applicants have permitted this cause in which they are not named as parties to proceed to judgment; and that it would not promote the interests of the administra-

tion of justice to permit the requested intervention, it is hereby

Ordered That:

Applicants' motion for leave to intervene is in all respects denied.

Dated: November 16th, 1959.

Sylvester J. Ryan, Chief Judge.

[fol. 721] [File endorsement omitted]

United States District Court
Southern District of New York

[Title omitted]

Affidavit of Edward Rosenberg as to Mailing Documents—Filed November 18, 1959

State of New York County of New York ss.:

Edward Rosenberg, being duly sworn, deposes and says:

I am over twenty-one years of age and am employed by the American Society of Composers, Authors and Publishers (hereinafter "ASCAP"). My duties include the supervision of mailing documents to the members of ASCAP.

Exhibit "A" hereto attached is a copy of a Notice of a Special Meeting to be held in Los Angeles on November 11, 1959, dated November 2, 1959, addressed to the West Coast members of ASCAP, and signed by Deems Taylor, Secretary of ASCAP.

Exhibit "B" hereto attached is a copy of a Notice of a Special Meeting to be held in New York on November 24, 1959, dated November 2, 1959, addressed to all members of ASCAP, and signed by Deems Taylor.

Exhibit "C" hereto attached is a copy of a letter, dated November 2, 1959, addressed to the members of ASCAP, and signed by Stanley Adams, President of ASCAP.

Exhibit "D" hereto attached is a pre-paid postcard, addressed to ASCAP, with provision therein for indicating whether a member will attend the Special Meeting in Los

Angeles on November 11, 1959.

[fol. 722] Exhibit "E" hereto attached is a pre-paid postcard, addressed to ASCAP, with provision therein for indicating whether a member will attend the Special Meeting in New York on November 24, 1959.

Exhibit "F" hereto attached is a copy of a booklet containing (1) a letter dated November 4, 1959, addressed to all members of ASCAP, and signed by Stanley Adams, and (2) proposed amendments to the ASCAP Articles of

Association.

On November 2, 1959, envelopes were addressed to all members of ASCAP by running them through the ASCAP addressograph. Thereafter all such envelopes bearing addresses located in the State of California were sorted out. Into each of the envelopes so selected were inserted one copy each of the documents attached hereto and marked Exhibit "A", Exhibit "B", Exhibit "C", Exhibit "D" and Exhibit "E", and no other documents or material. On November 2, 1959, at approximately 9:10 P.M. and on November 3, 1959, at approximately 6:00 P.M., all the envelopes so selected, securely sealed and postpaid, air mail, first class, were mailed at the Grand Central Station Branch of the New York Post Office.

On November 3, 1959, into each of the above envelopes bearing addresses other than those located in the State of California were inserted one copy each of the documents attached hereto and marked Exhibit "B", Exhibit "C" and Exhibit "E". On November 3, 1959, at approximately 10:15 P.M. all such envelopes, securely sealed and postpaid, first elass, were mailed at the Grand Central Station Branch of the New York Post Office.

[fol. 723] On November 4, 1959, envelopes were addressed to all members of ASCAP by running them through the ASCAP addressograph. Thereafter all such envelopes bearing addresses located in the State of California were sorfed out. Into each of the envelopes so selected was inserted one copy of the document attached hereto and marked Exhibit "F", and no other documents or material.

On November 4, 1959, at approximately 8:00 P.M., all the envelopes so selected, securely sealed and postpaid, air mail, first class, were mailed at the Grand Central Station Branch of the New York Post Office.

Edward Rosenberg

Sworn to before me this 16th day of November, 1959.

Henry Hofschuster, Notary Public, State of New York, No. 03-6934300, Qualified in Bronx County, Certificate filed in New York County, Commission Expires March 30, 1960. (Seal)

MUrray Hill 8-8800 Cable Address: ASCAP, New York

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS 575 Madison Avenue New York 22, New York

November 2, 1959

MEMBERS ON THE WEST COAST

A Special Meeting of the West Coast Members of the Society will be held on November 11, 1959, at 8:00 P.M. at the Beverly Hilton Hotel, Beverly Hills, California.

At the last West Coast meeting, the proposed Consent Order further amending the 1950 ASCAP consent decree, was explained to the membership.

It was also stated that if the proposed Consent Order was approved by Chief Judge Sylvester J. Ryan, proposed amendments to the Articles of Association would be submitted to the members for their approval.

On October 19 and 20, 1959, hearings on the proposed Consent Order were held in New York before Chief Judge Sylvester J. Ryan of the United States District Court for the Southern District of New York. At that time, the hearing was adjourned to January 6, 1960, pending a vote by the members on the proposed Consent Order and the amendments to the Society's Articles of Association necessary to bring them into conformity with the proposed Consent Order.

The proposed Consent Order and the proposed amendments to the Articles of Association of the Society will be discussed at the meeting. You have already received a copy of the proposed Consent Order.* The proposed amend-

[•] If you wish an additional copy of the proposed Consent Order please write us.

ments to the Articles of Association will be sent to you in advance of the meeting.

The subject matter of the meeting is outlined at greater length in the accompanying letter from Stanley Adams, President of the Society.

Any member who so desires may be accompanied at the meeting by his lawyer. However, only the members themselves will be permitted to address the meeting. Anyone desiring to have his lawyer present should supply the name and address of the lawyer on the enclosed card.

Sincerely yours,

DEEMS TAYLOR
Secretary

MUrray Hill 8-8800 Cable Address: ASCAP, New York

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

575 Madison Avenue New York 22, New York

Nøvember 2, 1959

To All Members of the Society:

A Special Meeting of the Society will be held on November 24, 1959, at 8:00 P.M. at the Hotel Edison, 228 West 47th Street, New York, New York.

At the last meeting in New York, the proposed Consent Order further amending the 1950 ASCAP consent decree, was explained to the membership.

It was also stated that if the proposed Consent Order was approved by Chief Judge Sylvester J. Ryan, proposed amendments to the Articles of Association would be submitted to the members for their approval.

On October 19 and 20, 1959, hearings on the proposed Consent Order were held in New York before Chief Judge Sylvester J. Ryan of the United States District Court for the Southern District of New York. At that time, the hearing was adjourned to January 6, 1960, pending a vote by the members on the proposed Consent Order and the amendments to the Society's Articles of Association necessary to bring them into conformity with the proposed Consent Order.

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[•] If you wish an additional copy of the proposed Consent Order please write us.

ments to the Articles of Association will be sent to you advance of the meeting.

The subject matter of the meeting is outlined at great length in the accompanying letter from Stanley Adam President of the Society.

Any member who so desires may be accompanied at t meeting by his lawyer. However, only the members there selves will be permitted to address the meeting. Anyo desiring to have his lawyer present should supply the nar and address of the lawyer on the enclosed card.

Sincerely yours,

DEEMS TAYLOR Secreta

[fol. 726] EXHIBIT "C" TO AFFIDAVIT

MUrray Hill 8-8800 Cable Address: ASCAP, New York

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

575 Madison Avenue New York 22, New York

STANLEY ADAMS
President

November 2, 1959

Dear Fellow Member of ASCAP:

As you recall, we sent you copies of a proposed Consent Order modifying the 1950 ASCAP Consent Decree, as well as memoranda of special counsel explaining it, and advised you that a hearing would be held on this proposed Order before Chief Judge Ryan in the Federal District Court in New York on October 19. That hearing took place on October 19 and 20.

At the hearing, the lawyers representing the Department of Justice presented the proposed Consent Order to the Court and stated that it had their complete approval. At the end of the presentation, the following colloquy occurred:

"The Court: . . I understand now that it is the considered judgment of the Antitrust Division of the Attorney General's office that this proposed amended decree is the pest in their judgment that can today be devised and framed.

"Mr. Bennett [of the Department of Justice]: That is my understanding, your Honor; that the alternative would be litigation on the subject.

"The Court: And that your Department recommends it to the Court without reservation of any kind.

"Mr. Bennett: That is correct, your Honor." (Transcript of hearing, pages 100-101)

Thereafter, the Court asked Arthur H. Dean, as counselfor ASCAP:

"The Court: .

Ther point involved here is do you feel, Mr. Dean, representing the Society, that you have accomplished the best possible results in light of the purposes of [fol. 726a] this suit for the Society as a whole and for its individual members?

"Mr. Dean: Yes, your Honor, I do. I can answer that unqualifiedly yes." (Transcript, pages 110-111)

The Court then heard those members who had objections to various provisions of the Consent Order.

In connection with these objections, Judge Ryan observed that the alternatives before him were to approve the proposed Consent Order as submitted to him by the Department of Justice and ASCAP, or to disapprove it.

Judge Ryan pointed out that, if he disapproved the proposed Consent Order, the consequence might be a trial which "perhaps may result in an order of dissolution" of ASCAP. (Transcript, page 271)

At the end of this hearing, Judge Ryan noted that (as provided in Article VII of the proposed Consent Order) ASCAP could not unconditionally agree to the proposed Consent Order until a vote was taken among the members of ASCAP to amend the Articles of Association so as to make them consistent with the requirements of the proposed Order. Judge Ryan then suggested that the hearing be adjourned to January 6, 1960, so that this vote could be taken.

In addition to taking the vote to amend the Articles of Association as required by the existing Articles of Association and as contemplated by the proposed Order, Judge Ryan further suggested that the members also be asked to express their approval or disapproval of the proposed Order itself in its entirety.

It should therefore be clearly understood that a vote in favor of the proposed Consent Order as a whole, weighted in accordance with the existing Articles of Association, shall also constitute a vote to amend the Articles of Association.

Judge Ryan further suggested that for his information the vote on the proposed Consent Order be taken on a "yes" or "no" basis and that the vote be tabulated in two ways:—first, on the weighted number of votes each member now has under the existing Articles of Association: and, second, on a numerical basis.

Judge Ryan indicated that he considered that the proposed Consent Order represented definite improvements [fol. 726b] over existing procedures, and that if the lawyers for ASCAP come back and say that they consent to these modifications of the 1950 decree with the approval of the membership, he would be inclined to give his approval.

Judge Ryan further stated:

"While individual members may have objection to one particular subdivision of the decree they may feel that others are advantageous and desirable and that on an overall basis they will take the bad with the good to accomplish an overall improvement. That would be my idea." (Transcript, page 351)

The proposed Consent Order, together with the proposed amendments to the Society's Articles of Association (a copy of which will be sent to the members in advance of the meeting) will be discussed at the membership meetings on the West Coast on November 11, 1959 and in New York on November 24, 1959.

Let me be clear. The choice is whether to accept, in its entirety, the proposed Consent Order which was so carefully and patiently worked out between the Society and the Department of Justice, or to reject it in its entirety, with the possible consequence of a protracted, expensive and hazardous trial. In the interim, the operations of the Society would be greatly handicapped.

After the West Coast and New York meetings, ballots will be sent to the members to vote on whether they are for or against the proposed Consent Order and the proposed amendments to the Articles of Association.

It is extremely important that every member vote on these vital questions and express his opinion.

Your Board of Directors has unanimously approved the proposed Consent Order and unanimously recommends that the membership vote in favor of it, and consequently adopt the necessary amendments to the Articles of Association.

A vote in favor of the proposed Consent Order and the proposed amendments to the Articles of Association would in effect be a vote for the continuation of our Society on the basis of the 1950 Consent Decree as modified by the proposed Consent Order. A vote against the proposed Consent Order would in effect be a vote for a possible lawsuit by the Government against the Society, with the possibility of dissolution.

[fol. 726c] In this connection, I would like to call to your attention a statement made by Judge Ryan:

"The thought comes to my mind that if you people who are members of ASCAP can't agree amongst yourselves as to what is fair, when the Government has made an impartial study and recommends it, you might wind up with no association at all, and you will all have something to worry about." (Transcript, page 135)

I urge you to study this matter with care, and then to vote with full knowledge of and responsibility for the ultimate results of your vote.

Sincerely,

STANLEY ADAMS, President

P.S.: A copy of the proposed Consent Order has previously been mailed to all members and a further copy will be mailed with the forthcoming ballots. However, if you wish an additional copy of the proposed Consent Order, please write us.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

575 Madison Avenue New York 22, New York

STANLEY ADAMS
President

November 4, 1959

To All Members of the Society:

Attached hereto are proposed amendments to the Society's Articles of Association, which the Society must adopt before it can finally agree to the proposed Consent Order which would further amend the Amended Final Judgment in *United States* v. ASCAP. These proposed amendments will be discussed at the Special West Coast Meeting on November 11, 1959 and the Special Membership Meeting in New York on November 24, 1959.

This memorandum briefly outlines the subject matter of the proposed amendments. Reference is made to the attached amendments themselves for the content of the proposed amendments.

Resigning Members

Article III, Section 14, entitled "Withdrawal From Membership," would be amended with respect to the rights of a resigning member to receive distributions for works licensed by the Society.

Board of Directors

Article IV, Section 4, would be amended to permit an election for the Board of Directors to take place, under the proposed amended voting provisions, at a time earlier than the Spring of 1961 when the next election would normally occur.

Nomination of Directors

Article IV, Section 4, relating to the nominations of candidates for the part of Directors, would be amended to provide that, in addition to those candidates nominated by the committees on nominations, additional candidates may be nominated by 25 writer or publisher members, as the case may be.

Certain language changes would be made in Article IV, Section 4(d) in connection with the proposed amendment permitting a director or directors to be elected by a petition in advance of a general election (see discussion below).

Voting Provisions

Article IV, Section 4(h), which sets forth the basis for determining the number of votes of each member, would be amended so as to substitute new formulae for the allocation of votes.

Section 4(i) would be added to the voting provisions, to permit any group of writer or publisher members, as the case may be representing one-twelfth of the votes of their class, to elect a director by submitting to ASCAP, 90 days or more before the date of any scheduled election for directors, a signed petition designating an eligible person as a director.

Distribution Rules

Article XIV, Section 6, relating to the Classification Committees, would be renumbered Section 6A. The last paragraph of this Section would be amended to provide that all rules and regulations affecting distributions to the members would be mailed to every member in the class thereby affected.

Distribution Protests

Article XIV, Section 6B, governing the procedure by which a member complains about his distributions, would be amended in several respects.

All distribution grievances would be submitted to a Board of Review in the first instance rather than to the respective Classification Committees. The Board of Review would replace the present Board of Appeals.

Appeals from all decisions of the Board of Review could be taken to an impartial panel of the American Arbitration Association.

The proposed amendments set forth the details for protest and review.

Composition of the Board of Review

The rules governing the composition of the Board of Review and the method of electing its members, which are set forth in Article XIV, Section 6C, would be the same as those now applicable to the Board of Appeals, except that the proposed voting formulae for electing directors would also be used to determine the votes for electing members of the Board of Review.

The Board of Directors unanimously recommends the approval of these amendments.

Sincerely yours,

STANLEY ADAMS, President

PROPOSED AMENDMENTS TO ARTICLE III, SECTION 14; ARTICLE IV, SECTION 4, PREAMBLE, AND SUBDIVISIONS (d), (h), and (i); ARTICLE XIV, SECTIONS 6, 6A, 6B, and 6C OF THE ARTICLES OF ASSOCIATION

Comparison of Existing Provisions of Articles of Association with

Proposed Amendments

Existing Provisions (with lines drawn through matter to be deleted)

Article III, Section 14:

"Section 14: Any member may withdraw from membership in the Society at the end of any fiscal year upon (1) giving three months' advance written notice to the Society, and (2) agreeing that his resignation shall be subject to any rights or obligations existing between the Society and its licensees under then existing licenses. Subject to the above, such withdrawal shall terminate all existing assignments and the member's relationship with the Society, except that the withdraw ing member shall be entitled to a proportionate share of distributions from royalties aceruing under existing licenses to the extent that such distributions are made solely on the basis of performances as shown in the survey of performances made by or for the Society.

Proposed Amendments (new matter italicized)

Article III, Section 14:

"Section 14. Any member may withdraw from membership in the Society at the end of any fiscal year upon (1) giving three months' advance written notice to the Society, and (2) agreeing that his resignation shall be subject to any rights or obligations existing between the Society and its licensees under then existing licenses. Subject to the above, such withdrawal shall terminate all existing assignments and the member's relationship with the Society, except that a withdrawing member whose works continue to be licensed by ASCAP by reason of the continued membership of a co-writer, writer or publisher of any such works, may elect to continue receiving distribution for such works on the same basis and with the same elections as a member would have, so long as the resigning member does not license the works to any other performing rights licensing organization for performance in the United States. The Society may require a written acknowledgment from such resigning member that the works have not been so licensed. In any event, a resigning member shall receive distribution from the Society on the basis of performances made under licenses in effect at the time of the member's resignation. Anything to the contrary notwithstanding, the Society may, at its option, deny resigning members the right to receive payment on any basis other than a. current performance basis, provided that such option must be exercised as to all resigning members alike."

Article IV, Section 4:

"Section 4. Members of the Board of Directors shall be elected in the following manner commencing with the year 1955, and in each alternate year thereafter:

"(d) Each committee on nominations hall promptly select and nominate from the golicial membership one candidate for each publisher directorship and two candidates for each writer directorship, the term of which is currently expiring. It shall secure the consent of such candidates to stand for the office and shall also automatically regard the incumbent of the expiring directorship as a candidate for re-election unless by him otherwise instructed in writing. If any publisher member incumbent shall fail to stand for re-election then two candidates instead of one shall be nominated for his office."

"(h) Voting rights of all members within their respective classes in Elections of Directors, shall be upon the following basis that no member entitled to vote chall have then one vote in any event):

Composer-Author Members

"One (1) vote for each \$20 or major fraction thereof received during the previous calendar year as participation in

PROPOSED AMENDMENTS (continued)

Article IV, Section 4:

"Section 4. Members of the Board of Directors shall be elected in the following manner commencing with the year 1961, and in each alternate year thereafter (except that the election which would otherwise occur in 1961 may be held at an earlier time if the Board of Directors so determines and the members so elected shall serve until the election of their successors in the year 1965):"

promptly select and nominate from the general membership one candidate for each publisher director to be elected in the general election. It shall secure the consent of such candidates to stand for the office and shall also automatically regard each incumbent director as a candidate for reelection unless by him otherwise instructed in writing. If any publisher member incumbent shall fail to stand for re-election then two candidates instead of one shall be nominated for his office.

"In any election for the Board of Directors the nominees for Directors shall include, in addition to those nominees chosen by the Nominating Committees, any person eligible to be a Director who is designated by a petition subscribed to by 25 or more of the members of the Society entitled to elect such Director. Any such petition designating a candidate must be submitted to the Society in writing at least 10 days prior to the selection and nomination of candidates by the Nominating Committees."

"(h) Voting rights of all members within their respective classes in Elections of Directors, shall be determined upon the following basis, subject to the limitation that no member shall have more than 100 votes:

Composer-Author Members

"Each composer or author member who I is received any performance credits in the latest available preceding fiscal survey

the Society's distributions of domestic royalties excluding all sums received as prize awards.

Publisher Members

"One (1) vote for each \$500 or major portion thereof received during the previous calendar year as participation in the Society's distributions of domestic royalties."

Proposed Amendments (continued)

year shall have one vote, plus (i) one vote for each 1,000 credits up to 20,000 credits, plus (ii) one vote for each 2,000 credits from 20,001 to 26,000 credits, plus (iii) one vote for each 3,000 credits from 26,001 to 35,000 credits, plus (iv) one vote for each 4,000 credits from 35,001 to 51,000 credits, plus (v) one vote for each 5,000 credits from 51,001 to 101,000, plus (vi) one vote for each 6,000 credits in excess of 101,000 credits.

Publisher Members

"Each publisher member who has received any performance credits in the latest available preceding fiscal survey year shall have one vote, plus (i) one vote for each 4,000 credits up to 100,000 credits, plus (ii) one vote for each 8,000 credits from 100,001 credits to 140,000 credits, plus (iii) one vote for each 12,000 credits from 140,001 to 200,000 credits, plus (iv) one vote for each 16,000 credits from 200,001 to 408,000, plus (v) one vote for each 20,000 credits in excess of 408,000 credits.

"The above formulae shall be kept current in the following manner. The number of writer and publisher performance credits respectively yielded by the Society's survey ended September 30, 1958 shall be calculated. This number shall be divided into the number of writer and publisher performance credits respectively yielded by the survey in the latest available fiscal survey year preceding the election in question. The resulting figures, rounded to the nearest tenth, for the writer members and publisher members respectively, shall be used as multipliers on each of the numbers above which is underlined.

"If at any time more than 40.8% of the total publisher votes would be represented by the ten publisher members and groups of affiliated publisher members' (as that term is used in Article IV, Section 1 hereof) having

(i) (No existing provision)

Article XIV, Section 6:

"Each such Committee shall set forth in writing the general basis of member classification which shall be made available to any member upon request.

"Section 6A. Protest to Classification Committees. Any member, aggrieved by his classification may, after any distribution,

PROPOSED AMENDMENTS (continued)

the highest number of publisher votes, the weighting of votes as set forth in the above formula for publisher members shall be changed to bring the percentage of votes of such publishers down to 40.8%. This shall be accomplished by proportionately diminishing the votes otherwise allocable to such publishers by the amounts necessary to effect such result. Anything to the contrary notwithstanding, a publisher member which is not subject to such diminution of its votes shall not be allocated more votes than any publisher member which is subject to such diminution.

"A member who received no performance credits in the latest available fiscal survey year shall not be entitled to vote in an Election for Directors."

"(i) Notwithstanding the provisions contained in subsection (f) of this Section 4, any group of writer members entitled to cast onetwelfth of the sotes of all writer members, or any group of publisher members entitled to cast one-twelfth of the rotes of all publisher members, may elect any eligible person a Director by signing a petition and presenting such petition to the Society at least 90 days before the date of any scheduled election for Directors. In such exent, the number of Directors to be elected in the general election shall be reduced by the number of Directors so elected by petition and all members signing such petition shall not be entitled to rote in the general election or to sign more than one petition in advance of any general election.

Article XIV, Section 6 will be renumbered Section 6A:

"Each such Committee shall set forth in writing the general basis of member classification, which shall be mailed to every member in the class thereby affected." file a protest in writing with the Classification Committee having jurisdiction over his classification. It shall be the duty of the Classification Committee to hear such member and to accept from him all papers in evidence submitted to the Committee. The Committee shall have the power to make rules respecting hearings upon such protests, with full power to appoint a subcommittee to investigate such protest.

"The Committee shall make its decision within thirty days from the date of filing the protest. Such decision shall be conclusive and final unless the member shall file an appeal in the manner hereinafter prescribed."

Article XIV, Section 6B:

"Section 6B. Appeals From Classification. Any member who is dissatisfied with the deeision of the Classification Committee may give notice in writing to the Secretary of the Society within thirty days thereafter, stating that he proposes to appeal to the Board of Appeals; the Board of Appeals shall entertain his appeal and give him an opportunity to appear in person, or by any other person of his own selection, including a member of the Society, if he so desires, or to present his appeal in writing or both; any one or more members of the Classification Committee may likewise appear in person on Such appeal; the decision of such Board of Appeals shall be deemed final unless either the member or the Classification Committee files a notice of appeal in writing with the Secretary of the Society within thirty days after receiving written notice of such decision of the Board of Appenle; in such case all evidence taken before the Board of Appeals shall be referred to the Panel provided for in Section 6D of this Article XIV.

Article XIV, Section 6B:

"Section 6B, Protests. Any member, aggrieved by the distribution of the Society's revenues to such member, or by any rule or regulation of the Society directly affecting the distribution of the Society's revenues to such member, may give notice to that effect in writing to the Secretary of the Society, stating that he proposes to protest to the Board of Review and setting forth the grounds for his complaint. The Board of Review shall entertain his complaint and give him an opportunity to appear in person, or by any other person of his own selection, including a member of the Society, if he so desires, or to present his complaint in writing or both; any one or more members of the applicable Classification Committee may likewise appear in person on such complaint.

"The Board of Review shall set forth in detail its findings of fact and the grounds of its decision. Stenographic transcripts of each proceeding before the Board of Review shall, at the request of any member, be supplied by the Society to such member at cost. If the Society itself requires or makes use of the transcript, the member shall pay only the cost of making a second copy.

"The decision of the Board of Review shall be deemed final unless either the mem-

The Panel, after considering any such appeal, may reverse the decision of the Board of Appeals and determine the classification of such member by a vote of not less than two-thirds of the Panel and in its discretion may impose costs. If less than twothirds of the Panel vote for reversal, the decision of the Board of Appeals shall be affirmed. The decision of the Panel shall be conclusive and final. No member chall have the right to take an appeal to the Board of Appeals or to the Panel more than once during each calendar year. In case of a reclassification of a member, such reclassification shall not be retroactive but shall become effective on the succeeding distribution.

PROPOSED AMENDMENTS (continued)

ber or the Classification Committee files a notice of appeal in writing with the Secretary of the Society within thirty days after receiving written notice of such decision; in such case all evidence taken before the Board of Review shall be referred to the Panel provided for in Section 6D of this Article XIV.

"The Panel, after considering any such appeal, may reverse or modify the decision of the Board of Review by a vote of not less than two-thirds of the Panel and in its discretion may impose costs. If less than two-thirds of the Panel vote for reversal or modification, the decision of the Board of Review shall be affirmed. The decision of the Panel shall be conclusive and final.

"On appeal to the Panel from an adverse decision of the Board of Review, the appellant may seek to have the order, ryle or regulation involved properly interpreted or applied, to have errors rectified, or to void such rule or regulation on grounds of its discriminatory or arbitrary character. Any additional amounts finally determined by the Board of Review (or, in case of appeal, by the Panel) to be due a member with respect to the distribution complained of by such member and all subsequent distributions to the date of the decision shall be paid to the member promptly after the rendering of such decision.

"Any complaint by a member pursuant to this Section 6B must be filed by the aggrieved member within nine months of the receipt by him of his annual statement or of the rule or regulation on which such complaint is founded and the relief which the Board may grant in terms of monetary payment shall not extend back beyond the period of time covered by such annual statement, provided, however, that if the alleged injustice is such that the aggrieved party would not reasonably be put on notice of it by his annual statement, the relief given may reach back as far as, in the opinion of the Board of Review, is required to do justice to all parties.

"If any member of the Board of Appeals should be dissatisfied with his classification, he shall have the right to appeal to the Board of Directors which for purposes of such appeal shall act as the Board of Appeals.

"In the event that the Board of Appeals or the Board of Directors, as the case may be, shall not reach a decision at the meeting at which any appeal shall be presented, a decision may be made at any subsequent meeting of such Board. All members of such Board present at the meeting at which the appeal is voted on shall be entitled to participate in the consideration and decision of such appeal."

Article XIV, Section 6C:

"Section 6C. Board of Appeals. (1) Commencing with the election in the year 1951, and in each alternate year thereafter, there shall be elected for a two-year period from the general membership a Board of Appeals consisting of three writer members (one of whom shall be a standard writer) and three publisher members (one of whom shall be a standard publisher). No member of the Board of Directors nor any representative of a publisher member affiliated with any publisher member (as defined in Article IV. Section 1) having a representative on the Board of Directors, shall be eligible to serve on the Board of Appeals. The three writer members shall be elected by all the writers and the three publisher members shall be elected by all the publishers.

- "(2) Members of the Board of Appeals shall be elected in the following manner:
- "(g) Publisher members only shall be entitled to vote for members of the Board of Appeals from this class and writer members only for members of the Board of Appeals from this class. All writer members whether

PROPOSED AMENDMENTS (continued)

"If any member of the Board of Review wishes to assert a grievance of the class described in this Section 6B, he shall have the right to protest to the Board of Directors which for the purposes of such protest shall act as the Board of Review.

"In the event that the Board of Review or the Board of Directors, as the case may be, shall not reach a decision at the meeting at which any complaint shall be presented, a decision may be made at any subsequent meeting of such Board. All members of such Board present at the meeting at which the complaint is voted on shall be entitled to participate in the consideration and decision of such complaint."

Article XIV, Section 6C (until such time as the provisions of proposed Section 6C' shall become effective, the provisions of existing Section 6C shall continue to apply):

"Section 6C. Board of Review. (1) Commencing with the election in the year 1960. and in each alternate year thereafter, there shall be elected for a two-year period from the general membership a Board of Review consisting of three writer members (one of whom shall be a standard writer) and three publisher members (one of whom shall be a standard publisher). No member of the Board of Directors nor any representative of a publisher member affiliated with any publisher member (as defined in Article IV, Section 1) having a representative on the Board of Directors, shall be eligible to serve on the Board of Review. The three writer members shall be elected by all the writers and the three publisher members shall be elected by all the publishers.

- "(2) Members of the Board of Review shall be elected in the following manner:
- "(g) Publisher members only shall be entitled to vote for members of the Board of Review from this class and writer members only for members of the Board of Review from this class. All writer members, whether

author or composer, shall be qualified to vote for writer members of the Board of Appeals.

- "(h) Voting rights of all members within their respective classes in elections of members of the Board of Appeals shall be upon the basis specified in subdivision (h) of Article IV, Section 4.
- "(3) Four members of the Board of Appeals shall constitute a quorum and the affirmative vote of a majority of those present shall be required to change the classification fixed by the Classification Committee. In the event of an equally divided vote, the Board of Appeals shall certify the appeal to the Panel and its decision shall be binding, final and conclusive.
- "(4) The Chairman of the Board of Appeals (or in the case of a tie vote a member of the Board of Appeals representing each of the views of that body) may appear before the Panel upon any appeal from a decision of the Board of Appeals to the Panel.
- "(5) In case of the death, removal or resignation of a member of the Board of Appeals, such vacancy shall be filled by the election of a member belonging to the same class and division as the member whose place is to be filled, by a two-third vote of the entire Board, the term of office of such newly elected member to be for the balance of the term of the replaced member.
- "(6) Members of the Board of Appeals as such shall not receive any salaries for their services except that each member in attendance at each meeting of the Board of Appeals within five minutes after the meeting has been called to order, shall receive the sum of \$25 as an attendance fee."

PROPOSED AMENDMENTS (continued)

author or composer, shall be qualified to vote for writer members of the Board of Review.

- "(h) Voting rights of all members within their respective classes in elections of members of the Board of Review shall be upon the basis specified in subdivision (h) of Article IV, Section 4.
- "(3) Four members of the Board of Review shall constitute a quorum and the affirmative vote of a majority of those present shall be required for a decision pursuant to Section 6B of this Article XIV. In the event of an equally divided vote, the Board of Review shall certify the complaint to the Panel and its decision shall be binding, final and conclusive.
- "(4) The Chairman of the Board of Review (or in the case of a tie vote a member of the Board of Review representing each of the views of that body) may appear before the Panel upon any appeal from a decision of the Board of Review to the Panel.
- "(5) In case of the death, removal or resignation of a member of the Board of Review, such vacancy shall be filled by the election of a member belonging to the same class and division as the member whose place is to be filled, by a two-third vote of the entire Board, the term of office of such newly elected member to be for the balance of the term of the replaced member.
- "(6) Members of the Board of Review as such shall not receive any salaries for their services except that each member in attendance at each meeting of the Board of Review within five minutes after the meeting has been called to order, shall receive the sum of \$25 as an attendance fee."

[fol. 730]

[File endorsement omitted]

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Affidavit of Arnold Saemann as to Mailing Document—Filed November 18, 1959

State of New York County of New York ss.:

Arnold Saemann, being duly sworn, deposes and says:

I am over twenty-one years of age and am employed by the American Society of Composers, Authors and Publishers (hereinafter "ASCAP"). My duties include the supervision of mailing documents to the members of AS-CAP.

Exhibit "A" attached hereto is a copy of a booklet containing (1) a letter dated November 4, 1959, addressed to all members of ASCAP, and signed by Stanley Adams, and (2) proposed Amendments to the ASCAP Articles of Association.

On November 4, 1959, envelopes were addressed to all members of ASCAP by running them through the ASCAP addressograph. On November 5, 1959, one copy of Exhibit "A", and no other documents or material, was inserted into each of such envelopes, except those envelopes bearing addresses located in the State of California (see affidavit of Edward Rosenberg, dated November 16, 1959). At [fol. 731] approximately 5:00 P.M. on the same day all the aforedescribed envelopes (i.e., excluding those bearing addresses located in the State of California); securely sealed and postpaid, first class, were mailed at the Grand Central Branch of the New York Post Office.

Arnold Saemann

Sworn to before me this 16th day of November, 1959.

Henry Hofschuster, Notary Public, State of New York. No. 03-6934300, Qualified in Bronx County, Certificate filed in New York County, Commission Expires March 30, 1960, (Seal)

NOTE RE EXHIBIT "A" PURSUANT TO STIPULATION OF COUNSEL AS TO PRINTING RECORD

"Attached to the above affidavit of Arnold Saemann was a booklet containing a letter dated November 4, 1959 signed by Stanley Adams, and proposed amendments to the ASCAP Articles of Association which is identical to Exhibit F attached to the Affidavit of Edward Rosenberg dated November 16, 1959 which is printed elsewhere in this Record."

[fol. 733]

[File endorsement omitted].

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER DESIGNATING JEROME I. GOLINKO & Co. TO ASSIST IN CONNECTION WITH VOTING—November 27, 1959

Upon the consent of the parties hereto, it is hereby

Ordered that Jerome I. Golinko & Co. is designated by the Court to assist Mr. Herman Finkelstein in connection with the vote of the members on the proposed Consent Order further amending the Amended Final Judgment entered herein on March 14, 1950, and on the proposed Amendments to the defendant's Articles of Association; and it is further

Ordered that Jerome I. Golinko & Co., under Mr. Finkelstein's direction, carry out the procedures set forth in Annex A hereto.

·Sylvester J. Ryan, Chief Judge.

Dated: November 27, 1959.

Consented to:

Richard B. O'Donnell, Attorney for plaintiff.

Howard T. Milman, Attorney for defendant.

November 25, 1959

Procedures to be followed by the direction of the Court.

DATES: November 24th-close voting lists at end of the day November 29th-mail ballots December 19th—remove final ballots from PO box at midnight January 6, 1960—tabulation of ballots in open

Court

-VERIFICATION PROCEDURE:

- 1. Check publishers Payment Schedule for 1958 with ASCAP books of account, in total and for each publisher.
- 2. Check Writers Payment Schedule for 1958 with ASCAP books of account, in total and for individual writers on a test basis.
- 3. Check Publishers Voting List with Publishers Payment Schedule for votes on the basis of one vote for each \$500 of payment or major fraction thereof. Each publisher who has received no payment during 1958 to have one vote.
- 4. Check Writers Voting List with Writers Payment Schedule for votes on the basis of one vote for each \$20 of payment or major fraction thereof. Each writer who has received no payment during 1958 to have one vote.
- Review procedure for last minute changes in voting lists for deaths, new memberships etc.
- 6. Determine number of eligible votes for Writers and for Publishers separately. Also determine total number of ballots to be mailed.

B-MAILING PROCEDURE:

(ASCAP will turn over to Jerome I. Golinko & Co. unsealed envelopes containing various data to be mailed to members including ballot)

- Withdraw the ballot from the mailing envelope and check same to the voting list for
 - a: Number of votes
 - b: Ballot number
 - . and then reinsert in the mailing envelope.
- 2. Check face of mailing envelope for name of member and compare with the voting list.
- 3. Follow up any envelopes that are not addressed with an Addressograph stencil plate.
- 4. Mark voting list that ballot has been mailed.
- [fol. 735] 5. Keep envelopes in a locked room at ASCAP until November 28th.
- 6. On November 28th and 29th, run envelopes through mailing machine at ASCAP under the supervision of Jerome I. Golinko & Co. and place in mailing bags for which they will have locks and keys.
- 7. Tie up total pieces of mail run thru mailing machine with the total of ballots to be mailed as predetermined by Jerome I. Golinko & Co.
- 8. On November 29th sealed and locked mailing bags to be sent to the Post Office under supervision of Jerome I. Golinko & Co.

C-RECEIVING PROCEDURE:

(Mr. Mappen of Jerome I. Golinko & Co. has in his possession the PO box receipt and returned ballots will be removed from the PO box only by Mr. Mappen)

 Return envelope containing the ballot will be opened by Jerome I. Golinko & Co. and the ballot will be removed. The return mailing envelope will be retained. Ballot is not to be opened and tab-is not to be removed. A record will be kept of the number of ballots received each day.

- a. If a ballot is received with the tab sealed inside the ballot, the tab will be released only by Mr. Mappen and the ballot will be initialed and resealed by him.
 - b. Any ballot which is received without a tab or which appears to be unsigned will be segregated and listed. If such ballot is received prior to 9 A.M. December 18, 1959, Jerome I. Golinko & Co. will mail a replacement ballot, appropriately marked, with a request that it be properly executed, and with notice that it must be received before midnight on December 19 in order to be counted.
 - Ballots improperly executed shall be segregated and listed and separately submitted to the Court.
 - d. No attempt need be made to determine the authenticity of signatures, or the right of the publisher's representative to sign for the publisher.
- Imprint on the back of each ballot and on the back of each tab an identification number which will be different from the ballot number.
- Check to the voting list the ballot number, Writers or Publishers name, and the number of votes as indicated on the tab of the ballot.
- 5. Mark voting list that ballot has been returned. .
- [fol. 736] 6. Mark on the face of the unopened ballot the number of votes determined under 4 above.
- Non-participating writers ballots will be marked with the letter "N" for purpose of the analysis required in tabulation.
- 8. Segregate ballots into groups specified in D 5 below.
- Ballots to be stored in the custody of Jerome I. Golinko & Co., unopened until January 6, 1960, when they shall be produced in Court.

- Mr. Mappen will personally remove any remaining ballots from the PO box at midnight on December 19th.
 - 11. Mr. Mappen will subsequent to December 19th remove from the PO Box any ballots thereafter received. Those postmarked December 19th or earlier will be segregated and listed, and otherwise handled in the same manner as ballots received prior to midnight on December 19th. Ballots postmarked after December 19th will be segregated without opening the return mailing envelope.
 - 12. Any ballots delivered to the ASCAP offices will be turned over daily to Mr. Mappen and then handled in the same manner as those received by mail but a record will be kept of any ballots so delivered.
 - 13. Arrangements will be made by Mr. Finkelstein to receive delivery of ballots at the ASCAP office until midnight December 19th.
 - 14. ASCAP will prepare a list of any members who die between November 24th and December 19th and the total number of eligible votes will be reduced for any such members who have died without voting.

D-TABULATING PROCEDURE:

(On January 6, 1960, ballots will be tabulated by Jerome I. Golinko & Co., in accordance with the directions of Judge Ryan, and in open court on that day.)

- 1. Any ballots on which a ruling is desired will be presented to the Court on January 6, 1960.
- 2. The ballots will be brought to the Court unopened.
- 3. Remove tabs from ballots.
- 4. Open ballots and check number of votes on the inside of the ballot with the number of votes written on the outside of the ballot as per C-6 above.
- [fol. 737] 5. Ballots will have been segregated by classes as follows: (see C-8)

Writer members:

(a) Non-participating members

(b)	Participating	members	with	one	vote		
(c)	"	"	"	2	to	5	votes

(h) " " over 250 "

Publishe members:

(aa) With one vote

(bb)	86	2	to-	3	votes
(cc)	- 66	4	to ·	5	66

(dd) " 6 to 10

(ee) " 11 to 20 " (ff) " over 20 "

- 6. Tabulation of the foregoing groups will be done by two man teams so that there will be a double check on the tabulation as it proceeds. Ballots which have only one vote will merely be counted twice and the total of the checked count will be entered on the tabulation sheet.
- 7. All ballots will be tabulated as follows:
 - 1 "Yes" votes
 - 2 "No" votes
 - 3 Ballots returned but not marked either "yes" or "no"
- Tabulation sheets will be summarized separately for Writers and Publishers to indicate the total vote on all ballots returned.
- Reconcile total votes indicated by D-8 with total eligible votes for Writers and Publishers as determined under A-6 taking into consideration ballots disallowed and ballots not returned.

[fol. 749]

EXHIBIT 1 TO AFFIDAVITS

MR.		c*		٢
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SULLIVAN & CROMWELL

FILE COPY.

CLIENT

ASCAP

MATTER

Antitrust

October 27, 1959.

Charles A. Horsky, Esq., Messrs. Covington & Burling, Union Trust Building, Washington 5, D. C.

Dear Mr. Horsky:

Mr. Herman Finkelstein forwarded to me your letter of October 22, 1959. I note your request to be present when

the ballots are opened.

With respect to the submission of statements to members, I do not believe that any particular member has any special interest in the communications sent out by the Society or its Board of Directors. The transcript of hearings before Judge Ryan pretty definitely spells out the procedures for a mailing by those who appeared at the hearing, and ASCAP will carry out its assurances to the Court in connection with such a mailing.

Very truly yours, Arthur H. Dean. [fol. 750]

EXHIBIT 2 TO AFFIDAVITS

COVINGTON & BURLING Union Trust Building

EDWARD B. BURLING JOHN' LORD O'BRIAN DEAN G. ACHESON NEWELL W. ELLISON JOHN G. LAYLIN H. THOMAS AUSTERN FONTAINE C. BRADLEY ALAN C. MAXWELL HOWARD C. WESTWOOD EDWARD BURLING, JR. CHARLES A. HORSKY GERHARD A. GESELL JOEL BARLOW HUGH B. COX DONALD HISS W. GRAHAM CLAYTOR, JR.

J. HARRY COVINGTON JOHN T. SAPIENZA W. CROSBY ROPER, JR. NESTOR S. FOLEY JAMES H. MC GLOTHLIN DANIEL M. GRIBBON ERNEST W. JENNES HARRY L. SHNIDERMAN EDWIN MC ELWAIN STANLEY L. TEMKO DON V. HARRIS, JR. PAUL C. WARNKE JAMES C. MC KAY WILLIAM STANLEY, JR. JOHN W. DOUGLAS DAVID C. ACHESON

Washington 5, D. C.
October 29, 1959

Arthur H. Dean, Esq. Sullivan & Cromwell 48 Wall Street New York 5, New York

Dear Mr. Dean:

This will acknowledge your letter of October 27, 1959. In connection with the opening of the ballots, may I request that you advise me as far in advance as possible as to the date when the opening will take place so that I will not find myself in other engagements which will make it impossible to be present.

Very truly yours, /s/ C. A. Horsky

[fol. 751]

EXHIBIT 3. TO AFFIDAVITS

MR.	
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46	
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SULLIVAN & CROMWELL

FILE COPY

CLIENT A

ASCAP

MATTER

Antitrust.

December 2, 1959

Charles Horsky, Esq.,
Messrs. Covington & Burling,
701 Union Trust Building,
Washington, D. C.

Re: United States v. ASCAP

Dear Mr. Horsky:

In reply to your inquiry concerning the balloting procedures, I enclose a copy of an order relative to that matter signed by Chief Judge Ryan on November 27, 1959. A copy of that order was mailed to Mr. Cheyette on November 30, 1959.

With respect to the minutes of the meetings in Los Angeles on November 11, 1959 and in New York on November 24, 1959, the Society, of course, does not possess sufficient copies thereof to send to all interested members or their representatives. The Society would be pleased, however, to make a copy of the minutes of each of those meetings available for inspection by any member or his authorized representative at the ASCAP offices in New York City.

Very truly yours,

Arthur H. Dean

(Enclosure)

[fol. 753]

EXHIBIT 5 TO AFFIDAVITS

COVINGTON & BURLING Union Trust Building

EDWARD B. BURLING JOHN LORD O'BRIAN DEAN G. ACHESON NEWELL W. ELLISON JOHN G. LAYLIN. H. THOMAS AUSTERN FONTAINE C. BRADLEY ALAN C. MAXWELL HOWARD C. WESTWOOD EDWARD BURLING, JR. CHARLES A. HORSKY GERHARD A. GESELL JOEL BARLOW HUGH B. COX DONALD HISS W. GRAHAM CLAYTOR, JR. J. HARRY COVINGTON JOHN T. SAPIENZA W. CROSBY ROPER, JR. NESTOR S. FOLEY JAMES H. MC GLOTHLIN DANIEL M. GRIBBON ERNEST W. JENNES HARRY L. SHNIDERMAN EDWIN MC ELWAIN STANLEY L. TEMKO DON V. HARRIS, JR. PAUL C. WARNKE JAMES C. MC KAY WILLIAM STANLEY, JR. JOHN W. DOUGLAS DAVID C. ACHESON

Washington 5, D. C. December 14, 1959

Arthur H. Dean, Esq. Sullivan & Cromwell, 48 Wall Street New York 5, New York

Dear Mr. Dean:

In order that I may be prepared properly to evaluate the votes to be counted on January 6, would you be good enough to supply for me the following information:

Between the dates of October 20 and November 24, 1959—the date when the vote was ordered and the date when the voting lists were closed—(a) how many non-participating members of the Society were granted participating status and (b) how many new members in either non-participating or participating status were admitted to the Society. It would also be helpful if I could also have the totals for the period from January 1 to October 19, 1959.

Very truly yours,

/s/ C. A. Horsky

[fol. 754]

EXHIBIT 6 TO AFFIDAVITS

SULLIVAN & CROMWELL 48 WALL STREET

NEW YORK-5

CABLE ADDRESS "LADYCOURT"

December 18, 1959

O P Y

Charles A. Horsky, Esq.,
Messrs. Covington & Burling,
Union Trust Building,
Washington 5, D. C.

Re: United States v. ASCAP

Dear Mr. Horsky:

Answering your inquiry of December 14, 1959, I am informed that, between October 20 and November 24, 1959, the number of members admitted was 22 writers and 29 publishers. The number of members advanced from non-participating to active during that period was 37.

Between January 1, 1959 and October 19, 1959, the number of members admitted was 487 writers and 213 publishers. The number of members advanced from non-participating to active during that period was 111.

Very truly yours,

Arthur H. Dean.

SULLIVAN & CROMWELL 48 WALL STREET

New York 5

CABLE ADDRESS "LADYCOURT"

October 27, 1959.

P

Bernard Kaufman, Esq., Messrs. Kaufman and Kaufman, 570 Fifth Avenue, New York 18, N. Y.

Re: Lewis Bellin

Dear Mr. Kaufman:

In the light of your remarks at the hearing before Judge Ryan, I have reviewed your correspondence with Mr. Adams and Mr. Finkelstein of ASCAP with respect to your request for information on behalf of Mr. Lewis Bellin.

On September 24, 1959, Mr. Finkelstein wrote to you repeating the offer of an unlimited right to examine the records relating to Mr. Bellin's performances, and stating that it would be necessary for you to designate the order in which you wish to make the inspection with respect to his compositions. Mr. Finkelstein suggested that you list the compositions in question for the pertinent period of time or that you set forth some other criterion which will enable you to find the information you seek and which will not unduly upset the operations of the program department.

Mr. Finkelstein also stated that with respect to matters other than Mr. Bellin's performances, you would have to give more information as to what you were seeking.

It seems to me that if you will follow the reasonable procedures suggested by Mr. Finkelstein, you will be able to get the proper information.

Very truly yours,

Arthur H. Dean

[fol. 763]

EXHIBIT 15 TO AFFIDAVITS

SULLIVAN & CROMWELL 48 WALL STREET

NEW YORK 5

CABLE ADDRESS "LADYCOURT"

October 27, 1959

C O P Y

Mr. Guy Friedman,
Templeton Publishing Co., Inc.,
157 West 57th Street,
New York 19, N. Y.

Dear Mr. Friedman:

ASCAP has referred to me your letter of October 21, 1959 to Mrs. Kissel, in which you inquire concerning the song entitled "BE SOCIABLE".

In the normal course of events, the Society holds in abeyance performance credits for jingles until any advertising agency agreements concerning the works are submitted showing the disposition of performing rights. The performance credits for "BE SOCIABLE" are being held in abeyance because a copy of any such-agreement concerning "BE SOCIABLE" has not been sent to ASCAP.

I understand that both you and Mr. Henry Sylvern are aware of the need for submitting evidence as to the retention or disposition of performing rights before credits for a jingle can be compensated. I suggest that you forward this information to ASCAP.

Very truly yours,
Arthur H. Dean

[fol. 766]

EXHIBIT 18 TO AFFIDAVITS

SULLIVAN & CROMWELL 48 WALL STREET

New York 5

CABLE ADDRESS "LADYCOURT"

November 6, 1959

C O P Y

Mr. Guy Freedman,
Templeton Publishing Co., Inc.,
157 West 57th Street,
New York 19, N. Y.

Dear Mr. Freedman :

This will acknowledge your letters of November 2 and November 3, 1959, with respect to Mr. Sylvern's Pepsi Colajingle "BE SOCIABLE", as well as the copy of the contract with Kenyon & Eckhard.

as a jingle under direct license from Mr. Sylvern, presumably in accordance with the rights preserved to members of ASCAP under Article III, Section 6 of the Society's Articles of Association. Thus, it appears that no license from the Society is necessary for the performance of this jingle by Pepsi Cola. Under the circumstances, ASCAP would make no payments to Mr. Sylvern for use of the jingle by Pepsi Cola although I am advised by ASCAP that appropriate credits will be given for any use of the work which appears in the Society's survey, other than as the Pepsi Cola jingle.

I regret the delay resulting from the fact that the staff of the Society has been waiting for a copy of the agreement which you have now supplied. They should, of course,

have written you requesting it at once.

Sincerely yours,

Arthur H. Dean.

[fol. 767]

EXHIBIT 19 TO AFFIDAVITS

SULLIVAN & CROMWELL 48 WALL STREET

NEW YORK 5

CABLE 'ADDRESS "LADYCOURT"

November 4, 1959.

C O P

> Mr. Edgar William Battle, 560 West 149th Street, New York 31, N. Y.

Dear Mr. Battle:

After hearing your remarks to Judge Rean on October 20, 1959, I inquired about performance credits for the song entitled "TOPSY" and the payment for those credits.

The ASCAP records indicate the publisher of "TOPSY" to be Cosmopolitan Music Publishers. The substantially increased number of performances for "TOPSY" in the quarter year October 1, 1958 through December 31, 1958 was reflected in the July 1959 distribution to Cosmopolitan Music Publishers, and will be reflected to you as a writer in the October 1960 distribution. The publisher total of performance credits for this period, for radio and television was 19,483.63.

For the period from January 1, 1959 through March 31, 1959, Cosmopolitan Music Publishers has already received distribution in October 1959 for 951.71 television credits, and it has or will shortly hereafter receive distribution for the radio credits during that period. Your writer credits for this period will also be reflected in your October 1960 distribution.

The reason for the delay in the publishers' distribution for the radio credits for the period January 1 through March 31, 1959, was occasioned by mechanical failure experienced by The Service Burean Corporation, a subsidiary of International Business Machines. In processing the publishers' statements for this period; their automatic machines failed to print radio performance credits for compositions whose titles commenced with the letters "T" to "Z". When this difficulty was discovered, The Service Bureau Corporation reprocessed all of the publisher radio credits, and all corrections have now been made.

Very truly yours, Arthur H. Dean.

[fol. 770]

EXHIBIT 22 TO AFFIDAVITS

CABLE ADDRESS - SAMFOX NEWYORK

SAM FOX PUBLISHING COMPANY

INCORPORATED

MUSIC [Emblem] PUBLISHERS
RCA BUILDING RADIO CITY NEW YORK, N. Y.
CHICAGO HOLLYWOOD

New Address

This Letter From New York Office 11 West 60th Street New York 23, N. Y.

PHONE: CIRCLE 7-3890

HERBERT CHEYETTE RESIDENT COUNSEL

November 4, 1959

Mr. Howard T. Milman Sullivan & Cromwell 48 Wall Street New York 5, N.Y.

Dear Mr. Milman:

In accordance with our conversation of last week, I am hereby formally notifying you that the following speakers

wish to speak against the adoption of the Proposed Modification of the 1950 Consent Decree at the West Coast meeting on November 11, on behalf of those members who were represented by counsel at the Hearing before Judge Ryan, who now wish to oppose the adoption of the proposed modification.

Mr. Frederick Fox

Mr. Hans Lengsfelder

One writer whose name will be given to Mr. Adams before the West Coast meeting.

It is our understanding that these members will be permitted to speak before the meeting is thrown open to the general membership. It can hardly be open to dispute that the fairest pretentation of the alternatives involved requires alternate presentations by "proponents" and "opponents" of the Decree.

A similar letter will be sent to you with respect to the speakers for the East Coast meeting.

Sincerely yours,

/s/ HERBERT CHEYETTE Herbert Cheyette

HC:am

[fol. 771]

EXHIBIT 23 TO AFFIDAVITS

SULLIVAN & CROMWELL 48 WALL STREET

NEW YORK 5

CABLE ADDRESS "LADYCOURT"

c

o_

November 6, 1959

P

·Herbert Cheyette, Esq., Sam Fox Publishing Company, 11 West 60th Street, New York 23, N. Y.

Dear Mr. Cheyette:

This will acknowledge your letter of November 4, 1959, advising that Mr. Frederick Fox and Mr. Hans Lengsfelder wish to speak against the proposed Consent Order at the West Coast meeting on November 11th, and that you will notify Mr. Adams of the name of another writer who also wishes to speak against the proposed Consent Order.

I also note that these members wish to speak before the meeting is thrown open to the general membership.

I shall forward a copy of your letter to Mr. Adams who, as President of the Society, will preside at the meeting.

You can feel assured that the meeting will be conducted in the spirit of the suggestions of Judge Ryan, and that the members to whom you refer will be given a fair opportunity to speak.

The fair and orderly conduct of the meeting is and must be the responsibility of Mr. Adams as President and we have no authority to restrict his discretion as Presiding Officer. It would be inappropriate for him to agree in advance that the three members to whom you refer will be permitted to speak before any of the other members, or that these three members and three selected "proponents" will be permitted to speak alternately before any of the other members. Mr. Adams' discretion in recognizing speakers cannot be circumscribed and we want to be very

clear that we have no understanding as to how the meeting will be conducted.

However, consideration will certainly be given to the fact that Mr. Fox and Mr. Lengsfelder were represented by counsel at the hearing before Judge Ryan and that you have [fol. 771a] given advance notice that they, and an as yet unnamed writer member, wish to speak at the earliest opportunity.

> Sincerely yours, Howard T. Milman.

[fol. 772]

EXHIBIT 24 TO AFFIDAVITS-

COVINGTON & BURLING UNION TRUST BUILDING

EDWARD B. BURLING JOHN LORD O'BRIAN DEAN G. ACHESON NEWELL W. ELLISON JOHN.G. LAYLIN H. THOMAS AUSTERN FONTAINE C. BRADLEY ALAN C. MAXWELL. HOWARD C. WESTWOOD EDWARD BURLING, JR. CHARLES A. HORSKY GERHARD A. GESELL JOEL BARLOW HUGH B. COX DONALD HISS W. GRAHAM CLAYTOR, JR.

J. HARRY COVINGTON JOHN T. SAPIENZA W. CROSBY ROPER, JR. NESTOR S. FOLEY JAMES H. MC GLOTHLIN DANIEL M. GRIBBON ERNEST W. JENNES HARRY L. SHNIDERMAN EDWIN MC ELWAIN STANLEY L. TEMKO DON V. HARRIS, JR. PAUL C. WARNKE JAMES C. MC KAY WILLIAM STANLEY, JR. JOHN W. DOUGLAS DAVID C. ACHESON

WASHINGTON 5, D. C.

October 22, 1959

Herman Finkelstein, Esq., American Society of Composers, Authors and Publishers

575 Madison Avenue New York, New York

Dear Mr. Finkelstein:

As I mentioned to you at the conclusion of the hearing before Judge Ryan, I should like very much to be present

at the time the ballots in the elections directed by Judge Ryan are opened. You asked at the time that I spoke to you that I put this request in writing so that it would not be overlooked.

I would also like to call your attention to the necessity for establishing some procedure for the submission to the membership of statements by the SCAP Board of Directors and by the ASCAP members who appeared at the hearing in opposition to the proposed further amended consent final judgment. I hope you will be considering this question so that we may talk about it shortly.

Very truly yours, /s/ C. A. Horsky

[fol. 774]

EXHIBIT 26 TO AFFIDAVITS

SCHAEFFER & SCHAEFFER
ATTORNEYS AT LAW
54 WEST RANDOLPH STREET
CHICAGO 1
TELEPHONE, STATE 2-1225

MORTON SCHAEFFER October
LIBBY G. SCHAEFFER 28
1959

Herman Finkelstein, Esq. American Society of Composers, Authors & Publishers 575 Madison Avenue New York 22, N. Y.

Dear Herman:

Pursuant to our conversation, enclosed herewith please find copy of the report which I have submitted to my clients.

Sincerely,

MS:S enc. /s/ Morton Morton Schaeffer [fol. 774a]

SCHAEFFER & SCHAEFFER ATTORNEYS AT LAW 54 WEST RANDOLPH STREET CHICAGO 1 TELEPHONE STATE 2-1225

MORTON SCHAEFFER LIBBY G. SCHAEFFER

October 23, 1959.

REPORT

To: Publishers represented

From: Morton Schaeffer

Subject: Future Logging of ABC Radio Network

When I was first retained to represent 15 music publishers, members of the American Society of Composers, Authors and Publishers, on or about September 18, 1959, I immediately attempted to contact ASCAP for an explanation of the statement made by Arthur Dean, Special Counsel for ASCAP, that the ABC Radio Network was not included in the radio networks to be logged, but covered by a scientific sampling as recommended by Joel Dean Associates, economic and management consultants.

In the absence of any reply from ASCAP, I telephoned the Department of Justice in Washington and contacted Mr. Alfred Karsted, one of the attorneys who worked on the proposed amendments to the consent decree on behalf of the government. The government through Mr. Karsted, then submitted to me its memorandum in support of the proposed amendments. I also obtained a transcript of the hearings before the Small Business Committee, and its report on ASCAP policies.

When ASCAP on October 5, 1959 mailed to its members a memorandum with respect to the new survey put into effect on October 1, 1959, I submitted it to the Justice Department and received a reply from Robert A. Bicks, Acting Assistant Attorney General, Anti-Trust Division, which stated as follows:

"We are informed that the ABC Radio Network now has but one musical program, that the network pays ASCAP a license fee smaller than that of many individual stations and that the license fee paid by the network would not warrant the expense of taking a complete census of the ABC musical program.

"If the facts are as stated, it would seem unreasonable to require a complete census of the ABC Network and the proposed Order leaves ASCAP with some discretion in the matter, for Section II of the proposed order requires ASCAP to conduct or have conducted 'a census and/or a scientific sample'."

On October 15th, I met with Messrs. William Kilgore and Alfred Karsted in the office of the Anti-Trust Division [fol. 774b] of the Department of Justice in Washington. D. C. to determine what steps, if any, could be taken to ascertain the basis or to obtain figures to substantiate this alleged difference between the fees received by ASCAP from ABC, NBC and CBS Radio Networks.

The Justice Department would make no disclosure as to these amounts.

I also contacted the office of the Honorable James Roosevelt, Chairman of Sub-Committee No. 5 of the House Small Business Committee, and received from them a staff analysis, prepared by B. H. Jacques of the proposed amendments to the ASCAP consent decree which was dated October 9, 1959. This analysis had not been submitted to the members of the Sub-Committee, and was not considered an official report of the Committee. However, it was in the hands of the Anti-Trust Division of the Department of Justice on October 15, 1959. This staff Analysis states as follows with respect to the Performance Survey and Logging-System:

"The principal function served by the Society is to develop information disclosing the circumstances under which a member's songs have been used. It would have been reasonable to assume, therefore, that the Society would enable itself to carry out this mission in a professional, scientific and expert manner. Ac-

dually, however, the hearings of the House Small Business Committee disclose that the methods used by the Society to discover such information were surprisingly inept and inadequate. The 1950 decree required the Society to conduct objective surveys but there appears to have been a failure to do so.

"Antitrust attorneys took cognizance of this situation and have caused the proposed decree to contain provisions that would bring about marked improvement in this important area of the Society's work. These provisions would seem to require the Society to conduct its samplings and surveys in accordance with recognized principles used by other organizations performing similar functions.

"Some method must be found to reduce the quantity of unidentified tunes. Paragraph II (A) of the Order states that ASCAP in certain cases shall endeavor to obtain logs of performances to reduce nonidentifications, but this requirement is weakened and perhaps nullified by permitting it to be done 'as the surveying organization deems necessary'.

"It is noted that the Antitrust Division has reserved the right to ask the court at a later date to require changes or improvements in the survey procedures. Accordingly, further improvements should be required if found desirable."

fol. 774c] I also conferred with Messrs. Richard O'Donell, John L. Wilson and Walter Bennett in the New York office of the Anti-Trust Division of the Department of sustice on October 16, who confirmed my opinion that the sustice Department felt that the proposed changes would be an improvement of the present internal workings of SCAP.

Finally I was able to confer with Mr. Herman Finkelein, general counsel for ASCAP, and obtained from him a greenent to continue taking the logs prepared by BC Radio Network and using them for the purpose of suring identification of all musical compositions taped

from the ABC Radio Network-under the scientific sample, subject to the approval of ASCAP's special counsel.

I was present at the hearings before Judge Sylvester

Ryan on October 19th and 20th.

The agreement I obtained was confirmed by the statement of Mr. Arthur Dean in open Court and made part of the record that the Society would continue to accept for identification purposes the logs of ABC Radio Network.

This means that every musical number of whatever nature used on the Breakfast Club will be identified in

the survey.

Most of the attorneys who appeared before the Court on behalf of ASCAP writers and publishers were in disagreement as to what the ultimate results would be from the proposed amendments.

It seemed to be the consensus of opinion that there would be some improvement, but as to how much no one

would even venture a guess.

My argument to the court was that there had been no disclosure to the publishers as to the basis of income from the radio networks so as to enable them to appraise the decision of ASCAP to drop ABC radio from net work logging. I was informed by the Court that the contracts of ASCAP with the Broadcasters specifically provide that such figures would not be publicly disclosed.

It is my belief that the Department of Justice is not wholly unaware of the internal workings of ASCAP. The proposed amendments which have been reached by way of compromise between the government and ASCAP, give recognition to many of the inequities and attempt to cor-

rect them.

It is true that this instrument does not claim perfection, but then it is impossible to find a formula which would satisfy every member of ASCAP. I do not believe that protracted litigation would be of benefit. It stands to reason that such litigation with its attendant expenses can only result in a reduction of income to all members. [fol. 774d] The Court in its comments indicated if the proposed amendments to the consent decree are not approved by the members of ASCAP, then the government

could bring ASCAP to trial on the entire matter with the possibility that a dissolution thereof would be ordered. This, of course, sounds extreme, but it is within the realm of possibility.

There is also the possibility if the proposed amendment to the consent decree is not approved by the membership, that the matter will go back to the Justice Department for the purpose of revision and to give effect to the ob-

jections voiced by some of the members.

The proposed amendments will be referred to the ASCAP membership for approval or disapproval. This vote will be reported to the Court, and hearing has been set for January 6, 1960.

Respectfully submitted,

/s/ MORTON SCHAEFFER Morton Schaeffer

[fol. 777]

EXHIBIT 29 TO AFFIDAVITS

0

December 29, 1959

Herbert Chevette, Esq. Sam Fox Publishing Company, Incorporated 11 West 60th Street New York 23, New York

Dear Mr. Cheyette:

This will confirm that, in accordance with your request, the minutes of the special membership meeting of the Society held November 24, 1959, will be made available for your inspection at 10:30 a.m., tomorrow, at this office.

Sincerely yours,

Herman Finkelstein

ec: Arthur H. Dean, Esq.

[fol. 779]

EXHIBIT 31 TO AFFIDAVITS

CABLE ADDRESS "DROCIR" NEW YORK

TELEPHONE J.Udson 2 5300

[Emblem]

G. RICORDI & CO. INCORPORATED ' MUSIC PUBLISHERS 16 West 61st Street

NEW YORK 23, N. Y.

[Emblem]

ESTABLISHED 1808 IN MILAN

BRANCHES

GUIDO VALCARENGHI FRANCO COLOMBO

ROME

NAPLES

PALERMO

GENOA

LONDON

PARIS

BRUSSELS

LEIPZIG

LORRACH

FREIBURG

BASEL

TORONTO

MEXICO CITY

SAO PAULO

BUENOS AIRES

SYDNEY

CHAIRMAN OF THE BOARD PRESIDENT

EUGENIO CLAUSETTI SECTARY AND TREASURER

Mr. Stanley Adams, President American Society of Composers Authors and Publishers 575 Madison Avenue New York 22, N. Y.

October 9, 1959 🚄

Dear Mr. Adams:

On Wednesday, September 23, 1959, at the invitation of Mr. Irving Broude, a certain number of publishers, members of A. S. C. A. P., mainly devoted to the publishing of so-called "serious" music, held a meeting on A. S. C. A. P.'s premises for the purpose of commenting on the various documents distributed by A. S. C. A. P. to the entire membership, namely: an Order by Judge Sylvester J. Ryan, dated June 29, 1959, with several annexes; a Memorandum, dated July 21, 1959, of Sullivan & Croinwell; the "Remarks of Mr. Arthur H. Dean at the New York Meeting of A. S. C. A. P. on August 27th, 1959"; and the Memorandum of the Department of Justice, dated September 2, 1959; all such documents herein cumulatively referred to as the "New Consent Decree".

The gathering was informal and had mainly an exploratory purpose. It was, nevertheless, attended by two members of the A. S. C. A. P. Board of Directors, Mr. Frank Connor and Mr. Adolph Vogel and, at least for part of it, by yourself, Mr. Richard Murray and Mr. Herman Finkelstein.

[fol. 779a] The meeting mainly discussed the impact that the "New Consent Decree" may have on the survey of the use of "serious" music by various organizations dealing with A. S. C. A. P. and on the distribution of the monies such organizations pay annually to A. S. C. A. P. under a blanket license.

The meeting felt the need to have the "New Consent Decree" closely examined and for this purpose appointed a Committee composed of the following:

Mr. David Adams, of Boosey & Hawkes Mr. Irving Broude, of Broude Brothers Mr. Salvatore Chiantia, of Leeds Music Corp.

Mr. Franco Colombo, of G. Ricordi & Co.

Mr. Arthur Hauser, of Theodore Presser Co.

Mr. Hans Heinsheimer, of G. Schirmer, Inc.

This Committee, upon having examined the "New Consent Decree", was to report to all publisher members having a particular, interest in the publication of "serious" music and submit its findings and its eventual recommendations for action. The two above-mentioned Board Members agreed to offer the Committee their assistance and A. S.

C. A. P. counsel, subject to the final decision of the A. S. C. A. P. Board of Directors, agreed in principle to make himself available to the Committee if necessary.

The Committee subsequently met three times, at the Office of G. Schirmer: on Friday, September 25, on Wednesday, September 30, and on Monday, October 5. At the conclusion of their work, the members of the Committee have prepared the attached Memorandum.

The Committee has asked me to submit such Memorandum to you for distribution to all A. S. C. A. P. publishers and composers principally interested in the writing and the publication of serious music and has, furthermore, charged me to convey to you their unanimous wish that a meeting of said publishers and composers be called by A. S. C. A. P. for the purpose of discussing, and eventually ratifying, [fol. 779b] the Committee's suggestions and elect the Committee referred to in the attached Memorandum.

With kind regards, I remain

Very sincerély yours,

FOR THE COMMITTEE

/s/ Franco Colombo Franco Colombo

FC/nv

ec. Mr. Frank Connor Mr. Rudolph Tauhert Mr. Adolph Vogel Mr. David Adams Mr. Irving Broude Mr. Salvatore Chiantia Mr. Arthur Hauser Mr. Hans Heinsheimer

[fol. 779e]

MEMORANDUM

The Committee, after careful consideration of the entire "New Consent Decree", has focused its attention on four points:

1) The "New Consent Decree" does not seem to take into sufficient consideration, in so far as the local radio survey is concerned, that "serious" music is mainly performed by Stations producing the lowest revenue to A. S. C. A. P. It is therefore feared that under the strict application of the advocated survey system, "serious" music snall continue to receive only a nominal compensation.

While the Committee and all publishers of "serious" music are fully aware of the relatively small economic exploitation such music lends itself to, they nevertheless are firm in their belief that such music is of utmost importance to A. S. C. A. P. because of its cultural value, both on the national and international scene, and because, through the granting at almost no fee of the license to perform said music to hundreds of stations located in every State of the [fol. 779d] Union, A. S. C. A. P. performs an invaluable good-will gesture. The Committee therefore feels that to confine the compensation of those who are instrumental in the creating and, at a considerable expense, publishing this music, to the bare mathematical earnings which are to be . expected from the mechanical application of the advocated survey system, would constitute discrimination against the composers and publishers of "serious" music.

On the other hand, having been assured by the Management of A. S. C. A. P. that the survey will regularly include the complete logging of all programs played by at least three, and possibly four, so-called "good music stations", and having furthermore ascertained that in all quarters of the A. S. C. A. P. Directorship and Management the above-mentioned cultural and good-will values of "serious" music are fully appreciated, and, finally, in view of the fact that the potential results of the "New Consent Decree" survey system are absolutely unforeseeable and shall not be properly evaluated until such time when the plan has been actually placed into operation,

[fol. 779e] THE COMMITTEE SUGGEST THAT:

no action be taken at present in order to modify the planned survey system, but that at the proper moment the pub-

lishers of "serious" music avail themselves—should it be the case—of the provision of the "New Consent Decree" concerning the "Review of Survey".

2) The "New Consent Decree" limits the logging of foreign Societies, which pay in excess of \$200,000 yearly to A. S. C. A. P. Composers of serious music attach paramount importance to the dissemination of their works throughout the entire world. Only thus may they hope to reach a large segment of the restricted public their music has and therefore achieve a position of prestige and the consequent financial security. To this purpose the publisher must go to great effort and expense so as to promote performances of "serious" works throughout the world. It becomes therefore of great economic importance that as many as possible of these performances yield to the publisher his rightful, revenue.

Consequently the Committee believes that the logs of a large number of foreign Societies should be scanned by A. S. C. A. P. for the purpose of accurately logging performances of at least important "serious" musical works, easily recognizeable either from their titles and/or from the names of their composers or publishers. After having [fol. 779f] been assured by the A. S. C. A. P. Management that under the "New Consent Decree" the foreign Societies' statements to be logged shall include, besides Canada, Great Britain and Sweden, also the statements of the German, French and Italian Societies,

THE COMMITTEE PROPOSES THAT:

the publishers of "serious" music consider as sufficiently representative the survey of foreign revenue, as established by the "New Consent Decree", and accept that all foreign revenue be distributed on the basis of such survey.

3) The Committee interprets the listing of works under letter "D" of the "Weighing Formula" as being specific and in such case finds it incomplete.

THE COMMITTEE PROPOSES THAT:

after the words: "... (including chamber music)" the following words be added: "for the opera and the ballet"; [fol. 779g] and that until such change can be put into effect, opera and ballet should be deeined as included among the works mentioned in Paragraph "D" of the "Weighing Formula".

4) The point which has most seriously concerned the Committee has been constituted by the criteria set forth in Paragraph "C" of the "Weighing Formula" for the qualification of a musical composition as "qualifying work" for the purpose of establishing their compensation for their use as themes, background music, cue and bridge music.

The requirements for a "qualifying work", as stated in the "New Consent Decree" (letter "C", sub-paragraphs "i" and "ii"), can very rarely be met by a "serious" musical work. The Committee therefore fears that the result of the application of the Formula shall be discriminatory against "serious" music.

THE COMMITTEE SUGGEST THAT:

a different criterion be used in order to qualify as "qualifying works", "serious works" as defined under letter "D" [fol. 779h] of the "Weighing Formula". Such criterion to be based on the fact the work has:

 a) obtained a certain number of feature performances on radio, television or in concerts;

and

b) been recorded commercially on records of the "Red Label" type or on tapes—either in the United States or abroad;

or

c) been published in its original form in its entirety.

In view of the fact that the "New Consent Decree", at least in so far as it can humanly be foreseen at this date, shall greatly modify the present distribution system and that it is therefore very difficult to formulate any recommendation to modify the "New Consent Decree", for the purpose of giving to "serious" music publishers and composers a fair and equitable compensation for the use of their properties and creations, with the certainty that such suggestions really constitute an improvement on what the "New Consent Decree" presently provides and in view [fol. 779i] of the cooperative attitude of A. S. C. A. P.

THE COMMITTEE SUGGEST THAT:

the publishers of "serious" music do not enter a claim in front of Judge Ryan in order to seek modifications to the "New Consent Decree" but do instead, together with the composers of "serious" music, appoint an Advisory Committee, possibly formed by four publishers and four composers, to rotate every year and not to serve for more than two consecutive years, to collaborate with the Board of Directors and the Management of A. S. C. A. P. for the purpose of:

- -examining the results of the application of the "New Consent Decree":
- -keeping all publishers and composers of "serious" music constantly informed of their findings;
- —accepting and conveying to the Board of Directors and Management of A. S. C. A. P. all suggestions and complaints which the Committee shall deem well-founded and interesting the totality of the composers and publishers of "serious" music;
- [fol. 779j] —proposing to the Board of Directors modifications or corrections of the survey system;
- —preparing in simplified and exemplified form, a set of rules concerning the survey system of "serious" music the distribution of Royalties, etc., under the "New Consent Decree" system.

It is in fact this Committee's firm belief that acknowledgement of the specific problems facing American composers and publishers of "serious" music, while not clearly defined and solved in the "New Consent Decree", were nevertheless present when it was drafted.

This is not only apparent from the wording of several provisions thereof, but has been also confirmed to Members of this Committee by the A. S. C. A. P. Management.

IT IS THEREFORE EXPECTED THAT:

—also on the part of the Department of Justice recognition and consideration of said problems shall be granted, even after the "New Consent Decree" has become operative;

[fol. 779k] —suggestions or claims which "serious" music publishers and composers may advance in order to translate the cultural values of their products into economic realities, essential for their very survival, shall be the object of careful and sympathetic attention from all quarters;

—the proposed Advisory Committee shall be the best and most authoritative instrument to formulate and properly submit such suggestions.

FOR THE COMMITTEE

/s/ Franco Colombo Franco Colombo

New York, October 9, 1959.

[fol. 791]

United States District Court
Southern District of New York
Civ. 13-95

UNITED STATES OF AMERICA, Plaintiff,

VS.

American Society of Composers, Authors and Publishers, et al., Defendants.

Before: Hon. Sylvester J. Ryan, District Judge.

Transcript of Proceedings of January 6, 1960 and January 7, 1960.

[fol. 792] Colloquy, Between Court, Counsel and Persons Delegated to Canvass Ballots

The Court: We are convened this morning for the purpose of canvassing in open court the ballots which were cast pursuant to the order that the Court made, directing that a ballot be taken on a proposed amended decree.

Mr. Dean, would you state for the record just what has been done in connection with the taking of this ballot, so that we might have on the record exactly what has been done.

Mr. Dean: Yes, your Honor. As your Honor will recall, when we recessed on October 20th, the hearings in this matter, so that members of ASCAP could vote on a proposed consent order that further amended the 1950 ASCAP consent decree and judgment, and on the proposed amendments to ASCAP's Articles of Association, which are required by the said proposed amendment to the consent decree, your Honor at that time designated Mr. Herman Finkelstein, who is in court this morning, the general attorney for ASCAP, giving him the responsibility of supervising the balloting and renting a post office box and receiving the ballots.

On November 27, 1959 your Honor entered an order designating Jerome I. Golinko & Company, independent Certified Public Accountants, to assist Mr. Finkelstein in connection [fol. 793] with the vote of the members, and attached to that order; as Annex A, were the procedures to be followed in verifying the number of votes to which each member was entitled, and the procedures for mailing the ballots, receiving the ballots, and tabulating the ballots today in open court.

I would like to inform your Honor that the procedures provided in that order of November 27, 1959 have been followed exactly. There was filed in court on December 17, 1959 a set of affidavits, describing what was actually done in connection with the preparation, checking and mailing of the ballots; and attached to that set of affidavits are the documents sent to the members, which include the following:

- (1) A covering letter dated November 29, 1959, signed by Mr. Stanley Adams, President of ASCAP, explaining the vote to be taken;
- (2) A ballot on which the members of ASCAP could vote "Yes" in favor of approving the amendment to the proposed consent order and to adopt the amendments to the Articles of Association, or to vote "No", that is to say, against approving the amendments to the proposed consent judgment and against adoption of the amendments to [fol. 794] the Articles of Association. Each ballot also had on it the number of votes to which the member is entitled under the weighted vote provisions of the existing Articles of Association of ASCAP;
- (3) A copy of the proposed consent order, as well as copies of the proposed Writers Distribution Formula and Proposed Weighting Formula; and
- (4) A copy of the Proposed Amendments to the Society's Articles of Association.

Pursuant to your Honor's order of November 27, 1959, the voting lists of ASCAP were closed at the end of the day on November 24, 1959, and the ballots were mailed by Jerome I. Golinko & Company on November 29, 1959.

Prior to that time, Jerome I. Golinko & Company had received the ballots and the envelopes in which they were mailed, as provided in your Honor's order of November 27, 1959.

I would like to request that the affidavits to that effect, of Mr. Herman Finkelstein, Mr. Aaron A. Mappen of Jerome I. Golinko & Company, and Mr. Robert Turner, each verified the 15th day of December 1959, and heretofore filed by the Court as a single document, be deemed [fol. 795] marked as Exhibit A.

· The Court: Will you mark them Exhibit A.

(Marked Court's Exhibit A.)

The Court: Those affidavits were filed with me, and I in turn sent them to the Clerk's office after examining them.

I am satisfied from a reading of them that the provisions

of my order were complied with.

Mr. Dean: On November 17, 1959, Mr. Finkelstein rented a post office box, No. 2578, at the Grand Central Station Post Office, and he turned the receipt for the box over to Mr. Mappen of Jerome I. Golinko & Company, on November 23, 1959, six days before the mailing. Mail could not be removed from this post office box without this receipt.

Each day Mr. Mappen removed all of the ballots received at the post office box prior to midnight on December 19, 1959. He thereafter removed and segregated any ballots received after that date. Ballots postmarked on or before December 19, 1959 and received thereafter have also been segregated and listed and are here in open court. Some ballots were delivered to the offices of ASCAP or to Mr. Finkelstein directly, and these ballots were daily turned [fol. 796] over unopened to Mr. Mappen on or before December 19, 1959.

The detailed method in which Mr. Finkelstein and Mr. Mappen complied with the receiving procedures set forth in the order of the Court of November 27, 1959 are set forth in the affidavits of Mr. Finkelstein and Mr. Mappen, verified January 5, 1960.

I would like to ask that these affidavits which are bound together with exhibits, be marked as Exhibit B.

The Court: They will be so marked.

(Marked Court's Exhibit B.)

The Court: These affidavits I haven't examined yet. I will do so during the morning.

Mr. Dean: I think I handed you my copy as well as

yours.

The Court: Yes, you handed me a copy.

I think if you do have copies, Mr. Dean, available, while the ballots are being canvassed later on, you may make them available to anybody who has an interest in them. Any member of the Bar who is here, who has an interest in looking at them, I would like you to make it available to them.

[fol. 797] Mr. Dean: We will be very happy to do that. The Court: All right.

Mr. Dean: As ordered by the Court, the sealed and unopened ballots are present in open court today, and these ballots have been in the custody of Jerome I. Golinko & Company continuously since they have been received and the ballots have been sorted for ease of tabulation. The ballots, however, remain sealed, so that up to this moment no one knows how the ballots are marked.

Mr. Mappen has prepared a memorandum, outlining the procedures to be followed in the tabulation of the votes today, which I would like to read into the record, and I would then like to have this memorandum marked as Exhibit C.

The Court: Suppose we mark it as Exhibit C now, and suppose you read it slowly into the record so that all those present may be advised as to the procedure which the Court intends to follow, because Mr. Mappen has prepared this schedule of proceedings after consultation with me.

Mr. Dean: This is on the letterhead of Jerome I. Golinko

& Company.

The Court: Suppose we mark it first as an exhibit, if you will.

[fol. 798] (Marked Court's Exhibit C.)

The Court: Take your time, and if you don't mind, read it slowly so that everybody can hear it. It is more important



that those present in the courtroom hear it than I, because

I know what is in there already.

Mr. Dean: I am reading from Exhibit C, on the letterhead of Jerome I. Golinko & Company, Certified Public Accountants, 1776 Broadway, New York.

It is headed:

"Memorandum of Proposed Tabulating Procedure to Be Followed in Court on January 6, 1960, in Connection With the ASCAP Balloting"

"1. The procedures outlined herein will be executed by the following partners and/or employees of our firm:

"Reinhold Dreher"-

The Court: Reinhold Dreher.

(Mr. Dreher stands.)

Mr. Dean: (Reading)

"Aaron A. Mappen."

[fol. 799] The Court: Mr. Mappen is over here.

I think I should interrupt you and state that I personally selected this firm to function in connection with the taking of this ballot, and I did so because of the services they had rendered me in other litigations, they and their deceased partner, Jerome I. Golinko. I found them to be thoroughly trustworthy, reliable and eminently competent, and they have the complete confidence and trust of the Court. They are functioning as officers of the Court.

Do you understand that, Mr. Dreher?

Mr. Dreher: Yes, your Honor.

The Court: And you do, too, Mr. Mappen?

Mr. Mappen: Yes, sir.

The Court: You both are functioning as officers of the Court here, assisting the Court in the canvassing of this balloting, and your assistants and associates are likewise functioning as officers of the Court, and I place in each and every one of you my utmost confidence and trust. I know that it will not be betrayed and I know that you will carry

out this trust faithfully, as you have carried out trusts imposed on you in the past. I want you to know that you [fol. 800] have not only the confidence and trust of the Court, but I expect that this will be an impartial canvassing, and I want it that way, and I have made that very plain to you from the very beginning.

All right.

Mr. Dean: "Paul J. Wendell."

The Court: He is one of the canvassers, is he?

Stand up, Mr. Wendell.

(Mr. Wendell stands.)

The Court: If you folks will stand up as your name is called, we will appreciate it.

Mr. Dean: "Abraham Leitner."

(Mr. Leitner stands.)

Mr. Dean: "Paul I. Krohn."

(Mr. Krohn stands.)

Mr. Dean: "Marie V. R. Pugliese."

(Miss Pugliese stands.)

Mr. Dean: "Jerome E. Turkel."

(Mr. Turkel stands.)

Mr. Dean: "Edward I. Rubinstein."

(Mr. Rubinstein stands.)

Mr. Dean: "Jerome Goldberg.".

(Mr. Goldberg stands.)

[fol. 801] · Mr. Dean: "Julian M. Weiss."

(Mr. Weiss stands.)

Mr. Dean: "Lillian Rodriguez."

(Miss Rodriguez stands.)

The Court: Now you ladies and gentlemen are to function as Mr. Dreher and Mr. Mappen in the canvassing of these votes. You have heard what I said to your employers, and that applies to you. Each and every one of you are functioning as officers of the Court here, and I place great trust and confidence in you. I want this to be a fair, a just, and an accurate canvass.

Mr. Dean: (Reading)

"2. The ballots will be brought to court unopened and have been segregated by classes as follows:

"Writer members:

"(a) Non-participating members

"(b) Participating members with one vote

"(c) Participating members with 2 to 5 votes

"(d) Participating members with 6 to 25 votes

"(e) Participating members with 26 to 50 votes

"(f) Participating members with 51 to 100 votes "(g) Participating members with 101 to 250 votes

"(h) Participating members with over 250 vo'es

[fol. 802] "Publisher members:

"(aa) With one vote

"(bb) With 2 to 3 votes

"(ce) With 4 to 5 votes

"(dd) With 6 to 10 votes
"(ee) With 11 to 20 votes

"(ff) With over 20 votes.

"3. Tabs will be removed from the ballots and filed in envelopes provided for that purpose.

"4. The ballots will be slit open on the machines provided for that purpose"—

The Court Can I interrupt?

Mr. Dreher, have you the ballots here!

Mr. Dreher: The ballots are all here, your Honor.

The Court: Are they segregated?

Mr. Dreher: They are all segregated right on these tables, all in view.

The Court: How are they segregated?

Mr. Dreher: They are segregated in accordance with your Honor's order. Those are publisher ballots.

The Court: All those on Mr. Mappen's table are publisher ballots?

Mr. Dreher: Yes, sir.

[fol. 803] The Court: Suppose you come over, and as you describe them, show us where they are, and I think you should state upon the record that Mr. Dreher, Mr. Mappen and the canvassers are in a roped-off inclosure in the courtroom. No one will be allowed to come into that roped-off inclosure except the Court and the court attaches during the canvassing of the ballots. The ballots will be canvassed in open court, where anybody can see what is being done by standing outside of the roped-off inclosure. But I don't want anybody to come into the inclosure except the canvassers and their principals, Mr. Dreher and Mr. Mappen, or officers of the court or myself; and the officers of the court and myself will not interfere in any way with the canvassing. This canvassing is to be done here in your presence, but without any interference of any kind.

All right. Will you just tell us.

Mr. Dreher: Your Honor, these are all the publisher ballots.

The Court: "These" indicating on the table over to my right the publisher ballots.

Do you know how many there are in number there? Have you numbered them yet?

[fol. 804] Mr. Mappen: Yes, we have.

Mr. Dreher? They have all been numbered, your Honor, for identification purposes, but we don't know exactly how many there are from this.

Let's see how many you have there, Aaron.

There are 1,101 publisher ballots. The Court: 1,101 publisher ballots.

Now these ballots have little tags on them, annexed to an envelope, have they?

Mr. Dreher: Yes, they are little tabs and they are sealed.

The Court: The envelopes are sealed and the tags protrude beyond the sealed portion of the envelopes.

Mr. Dreher: That's right, and they are perforated.

The Court: What is the procedure you intend to follow with reference to these ballots?

Mr. Dreher: Our procedure will be this. We will remove the tabs and segregate them in another envelope. They are of no consequence from here on, except if we have to make a reference to a voting list.

The Court: All right. Now what is on the tabs?

[fol. 805] Mr. Dreher: On the tabs there is a ballot number, a space for the number of votes, in this case the name of the firm, and the signature of a representative of the firm.

The Court: Now you are going to detach these tabs.

Mr. Dreher: That's correct.

The Court: And you are going to put them in a separate envelope.

Mr. Dreher: That's correct.

The Court: And that is to be done with each batch of ballots?

Mr. Dreher: Right.

The Court: And the envelope in which the tabs are to be placed is to be sealed and marked so that it can be identified.

Mr. Dreher: That's correct, your Honor.

The Court: And then that envelope is to be kept here and be deposited here with the tabs, and when I say "here" I mean with the Court.

Mr. Dreher: With the Court.

The Court: Now then, that will leave you the envelopes, the sealed envelopes, without the tabs, in which the ballots are set forth.

[fol. 806] Mr. Dreher: Your Honor, these are not the sealed envelopes. These are the sealed ballots.

The Court: The sealed ballots.

Mr. Dreher: Right.

The Court: What are you going to do now with the ballots?

Mr. Dreher: We have here two postage-opening machines. We will bring the ballots to the postage-opening machines.

The Court: I don't like that "postage-opening machine". That might be—

Mr. Dreher: Letter-opening machine.

The Court: Letter-opening machine. I don't want any interference with the mails.

You will have two letter openers here, mechanical letter

openers.

Mr. Dreher: That's right. We have letter openers from ASCAP, who know how to operate these inachines and will run them under our supervision.

The Court: How many operators are you going to have

on that?

Mr. Dreher: One of each machine.

The Court: Who are those two operators? Where are they?

[fol. 807] (Two men stood up in the courtroom.)

The Court: Come down here, gentlemen, you two, and we will put your names on the record.

You don't mind, Mr. Dean, my interrupting you?

Mr Dean: Not a bit, your Honor.

The Court: I want to be satisfied and I want everybody here to know what is going on.

What is your name, young man?

Mr. Dabundo: Guy Dabundo, D-a-b-u-n-d-o. / The Court: Where do you live, Mr. Dabundo?

Mr. Dabundo: 44 Third Place, Brooklyn, New York.

The Court: And your name, sir! Mr. Rosenberg: Edward Rosenberg.

The Court: Now you gentlemen better come over here and sit in those two chairs there. One will sit in a jury chair and the other one will sit over there, if you don't mind.

Now these two gentlemen are to simply-

Mr. Dreher: Operate the machines.

The Court: That will open the envelopes. Mr. Dreher: That will slit the ballots open.

[fol. 808] The Court: All right. Then what are they to

Mr. Dreher: Nothing more, sir.

The Court: Then I suggest that they proceed to open all these envelopes. You watch one of them; Mr. Mappen watch the other as he does it.

When I say "watch him", see that he does it mechanically right so as not to destroy or mutilate the ballots. Then you

take the ballots, each one of you, and when they have opened all of the ballots on these machines, they will then step out of the inclosure.

Do you understand what you are to do?

Mr. Dreher: Yes.

The Court: What is going to happen after you open this group of 1,100 publisher ballots? What is going to happen with those ballots first?

Mr. Dreher: They are going to go to Mr. Mappen and Miss Pugliese here, who as a team will count them and tabulate them.

The Court: All right. And have they tabulation sheets?

Mr. Dreher: They have tabulation sheets. Mr. Dean has an analysis and a copy of all of our worksheets in [fol. 809] skeleton form.

The Court: What is going to be on those tabulating

sheets!

Mr. Dreher: The tabulating sheets will show the number of "Yes" ballots and the number of "Yes" votes; the number of "No" ballots and the number of "No" votes; and the number of blank ballots, and the number of ballots which came in with no vote recorded, in other words, if there are any blank ballots.

The Court: In other words, that same procedure is to

be followed with each group of ballots.

Mr. Dreher: With each group of writer ballots and publisher ballots.

The Court: And publisher ballots, with each ballot that

comes in.

Mr. Dreher: Each ballot will be handled in this fashion.

The Court: After these canvassers have canvassed these ballots, this group of 1,101 ballots, a tallysheet will be made up?

Mr. Dreher: A summary sheet will be made up, your

Honor.

The Court: A summary sheet.

What will that show?

Mr. Dreher: Have you got a copy of that?

[fol. 810] Mr. Dean: Right here. Would your Honor like to see that?

The Court: No, I will see it later on. I want Mr. Dreher to explain it so that those present will know what is being done.

Mr. Dreher: Before I get to the summary sheet, your Honor, I might point out that these ballots have all—that each ballot, on each ballot there has been placed on the outside of the ballot the number of votes which should be on the inside of the ballot.

The Court: Yes.

Mr. Dreher: This was in order to prevent any tampering with the amount of votes.

Now as the ballots are opened, our checkers, our staff here, will, in addition to tabulating them, determine that the number of votes on the outside of the ballots, which is determined from the voting list, is the same as the number of votes on the inside of the ballots, which we have not seen yet.

The Court: I see. Then you are going to have an individual tallysheet, then a summary tallysheet.

Mr. Dreher: That's right.

Now with your Honor's permission, your order stated [fol. 811] that we would not individually write down a number "1" for each ballot which had one vote, we would segregate them into "Yes" votes and "no" votes and blank ballots; add up the number of ballots and indicate that on our sheet.

The Court: On your summary sheet.

Mr. Dreher: On a tabulation sheet, then to be contained on a summary sheet.

The Court: What is going to happen to the tabulation sheet and the summary sheet?

Mr. Dreher: They will be placed in evidence here, sir. The Court: They will be handed to me.

Mr. Dreher: They will be handed to you.

The Court: But I want the summary sheet signed and the tabulation sheet signed, each sheet signed by the canvassers at the bottom.

Mr. Dreher: We have made that provision.

The Court: All right. Then they will be handed to me.

Mr. Dreher: Yes.

Now with your Honor's permission, I would just like to ask that you permit us also not to list each individual ballot, where the ballot is anywhere from one to ten. [fol. 812] The Court: You don't have to do it at this stage.

Mr. Dreher: All right.

When that is completed, the individual teams will bring to me the results of the various groups of ballots which they have counted.

The Court: Yes.

Mr. Dreher: And I will list it on a summary sheet.

The Court: You will sort of prepare a super-summary

Mr. Dreher: That's correct.

The Court: All right.

Mr. Dreier: And Mr. Mappen will prepare a duplicate of that.

The Court: So that there will be check and double-check.

Then I want you to sign your super-summary sheet, which will be your election return.

Mr. Dreher: That's correct.

The Court: And Mr. Mappen will do the same.

Mr. Dreher: Yes, sir.

Now that summary sheet will show the number of "Yes" [fol. 813] votes, the number of "No" votes, and the number of blank votes. It will show the number of ballots and the number of votes for each one of the groups that you asked to be grouped in your order. We will also then break it down as between writers—it will be separately broken down as between writer-members and publisher-members; the total number of votes voting "Yes" will be determined. We have already determined the total number of eligible votes. We will determine for writers the percentage of eligible votes to total votes and take one-half of that percentage.

The Court: All right.

Mr. Dreher: We will for publishers determine the number of publishing members voting "Yes". We will divide that by the total number of eligible votes to determine the percentage of publisher-members voting "Yes". We will divide that by one-half, to get half of that percentage, and by adding those two percentages together we will have the

percentage of votes approving, voting "Yes" on this issue, in accordance with the Articles of Association of ASCAP.

The Court: All right.

Now will you just tell me what these other ballots are that I see laying here. I note the publishers ballots—
[fol. 814] Mr. Dreher: These are publisher ballots.

The Court: -are white.

Mr. Dreher: Gray, they are all gray, the publisher ballots. All of the writer ballots are these, in these four groups here.

The Court: They are blue.

Mr. Dreher: They are blue, and they are, all of them have been segregated merely by our teams here so they will approximately come out even when they go through our count.

The Court: How have you segregated them? That is what I would like to know.

Mr. Dreher: These are ballots having been 26 and 100 votes, writer ballots.

The Court: What is the next pile?

Mr. Dreher: The same.

The Court: Both. Now what team is going to take that? Mr. Dreher: Mr. Leitner's team.

What team have you got here? -

Mr. Wendell: From 6 to 25, and we have 101 to 250 votes.

Mr. Rubinstein: Your Honor, we have the group of bal-[fol. 815] lots from 2 to 5 votes and those over 250 votes.

The Court: And your name is?

Mr. Rubinstein: Mr. Rubinstein, your Honor.

Mr. Dreher: Your Honor, Mr. Krohn's team is the writer participants, one vote, and in this batch here we have the non-participants, one vote, except for one which has two votes, one ballot has two votes.

The Court: All right. Now I think we understand what is to be done here. Do you have any further statement

then as to the mechanics?

Mr. Dean: Yes. Some of this has been covered but I

would just like to finish reading this certificate.

The Court: You finish. You go ahead and finish. I hope you don't mind my interruptions, but I want it understood here what is going to be done.

Mr Dean: (Reading)

- "3. Tabs will be removed from the ballots and filed in envelopes provided for that purpose.
- "4. The ballots will be slit open on the machines provided for that purpose and the number of votes on the inside of the ballot will be checked with the number of votes which we have heretofore written on the [fol. 816] outside of the ballots in order to detect any attempt to alter the number of votes.
- "5. Tabulation of the votes will be made by 2-man teams so there will be a double check on the tabulation as it proceeds. The court order dated November 27, 1959 provides as follows:
 - "'Ballots which have only one vote will merely be counted twice and the total of the checked count will be entered on the tabulation sheet.'

"In the interest of greater speed in tabulation, we propose, if the court will approve, expanding this procedure to cover all ballots which reflect up to ten votes."

Your Honor has already ruled on that.

The Court: Yes.

Mr. Dean: (Reading)

- "6. All ballots will be tabulated on both weighted and numerical basis as follows:
 - "1. 'Yes' votes
 - "2. 'No' votes
 - ."3 Blank ballots.
- "7. Tabulation sheets will be summarized separately for writers and publishers to indicate the total [fol. 817] vote on all ballots returned.
- "8. We attach hereto a copy of the proposed working sheets which we will use in tabulation."

I had intended to go on and summarize the procedure, but I think your Honor's questions and Mr. Dreher's answers have covered some of this.

At the hearing on October 20th, ASCAP agreed that we would mail to its members any literature which any member wished to send to the membership. Several members did take advantage of this offer and brought in letters or postcards for mailing, and all of them were duly mailed.

I ask that the Court mark as Exhibit D a set of affidavits. These affidavits are by Mr. Finkelstein and other members at ASCAP who participated in these mailings

for members.

Also attached to the affidavits are copies of the mailings themselves.

(Marked Court's Exhibit D.)

The Court: I think I should say now that any member of the Bar who desires to look at any of these papers which have been marked as Exhibits may, if he has an interest in this matter, examine them while the canvassing is going on, however, not to come within the roped-off inclosure. [fol. 818] The clerk will make them available to you.

Mr. Dean: Your Honor will recall that on October 20th ASCAP agreed to pay up to \$1,000 for any joint mailing by those who appeared before the Court at that time in opposition to the proposed consent order. Such a joint mailing was made, and is set forth in Mr. Finkelstein's affidavit, ASCAP paid \$1,000 in connection with that mailing, and the payment after deducting postage was paid to Mr. Sidney Rothstein, a member of the Bar, at their request.

I have prepared a form of oath for Mr. Dreher, Mr. Mappen and other representatives of Jerome I. Golinko, who will participate in the tabulation, and if it meets with your Honor's approval, I would suggest that these persons sign the oath and be sworn by your Honor to execute faithfully and with strict impartiality their duties in tabulating the ballots in accordance with your Honor of November 27, 1959.

The Court: Is the oath in the usual canvasser's form?

Mr. Dean: Yes, your Honor.

The Court: All right. Will you, Mr. Dreher and Mr. [fol. 819] Mappen, will you sign this and have the others sign it. There is a copy for your files, so that you know what you have sworn to, and you will know in a few min-

utes, but in the meantime, at this point I think you had

all better sign it.

Now while that is being done, Is want to say that the Court has received a telegram this morning from one Bob A. Davis, asking that he have permission to change his vote on this matter. His application, which I accept in this form of the telegram, is denied. I am not going to permit anybody to change a vote which has been cast. In this case Mr. Davis would like to change his vote from "No" to "Yes". It is just too late.

Are you Mr. Davis?

Mr. Davis: Yes, your Honor.

The Court: You are too late. I am not going to permis

you to change your vote.

Mr. Davis: There is a misunderstanding there, your Honor. I voted "Yes". I pledged, I made a pledge, if you read the telegram correctly, I pledged "No" to one of the groups, I don't know, I have forgotten, I think the Lopez group.

The Court: But you did vote "Yes"?

Mr. Davis: I voted "Yes":

[fol. 820] The Court: Well, the telegram reads:

"Dear Judge Ryan Your Honor though I foolishly made a pledge to vote no but after thorough examination of the overall situation I changed my vote to yes and will gladly explain why if necessary Ballot 814 yours truly Bob A. Davis."

Now I don't want your explanation, Mr. Davis, although I appreciate your good intentions and good purposes.

Mr. Davis: Well, if you check-

The Court: Your ballot has to stand as east.

Mr. Davis: I say it is voted "Yes" if you check it.

The Court: Well, if you voted it "Yes" that is the way it is going to be counted.

Mr. Davis: Yes, sir.

The Court: Al! right. We will mark that as an exhibit. There will be no changin ballots at this stage. That will be Court's Exhibit E.

(Marked Court's Exhibit E.)

Mr. Dean: Just one more matter.

As your Honor is aware, under Section VII of the proposed consent order, ASCAP has to file a statement that the vote has been taken pursuant to Paragraph' (A) of Section VII. As soon as the results of the voting have been [fol. 821] announced here later today in open court, assuming that they are satisfactory to your Honor, I would like to file that statement required by Paragraph (A) of Section VII. Since we have taken the actual votes prior to the time of the entry of the order, I would assume that that would satisfy Paragraph (A) of Section VII of that order, and it would not be necessary to send anything further to the members before your Honor can enter the order, assuming that the tabulation meets the requirements.

The Court: I understand these ballots are to be preserved for how long after the canvassing of the votes?

Mr. Dean: They are to be turned over to Mr. Golinko, and they are to be kept in a safe in Mr. Jerome I. Golinko's office, and they are to be kept there subject to your Honor's order.

The Court: We will turn them over to Mr. Dreher. Mr. Golinko, I hope, is up in heaven. He died some months ago. He was a very fine man. We will turn them over to Mr. Dreher and Mr. Dreher will keep them in sealed containers until further order of the Court, and I will sign a formal order to that effect.

Have you any further statement you want to make, Mr. [fol. 822] Dean?

Mr. Dean: No, your Honor. I just want to hand up to you a proposed form of order for your Honor's consideration after the announcement of the vote.

The Court: Then you have no further statement?

Mr. Dean: No, sir.

The Court: Mr. Finkelstein, you heard the statements made by Mr. Dean; do you concur in their truthfulness and their accuracy?

Mr. Finkelstein: Yes, your Honor.

The Court: And have you carried out the instructions and the trust the Court has imposed upon you?

Mr. Finkelstein: I have, your Honor.

The Court: All right. Now the decision then will be this: We will canvass the votes here in open court. After

the votes are canvassed, the Court will examine the can vassing, the return and the tally and make an announcement in court. If that is completed today it will be done today. After that, any attorney who has a right to be heard may make an application to be heard concerning any matter [fol. 823] concerning this election or anything else concerning this proposed decree, and the Court will then passupon that application.

At this time we will not interrupt the canvassing of the votes. We will proceed first with the canvassing of the

votes.

Mr. Dreher: That is executed, your Honor.

The Court: Mr. Dreher, has each and every one of you and your assistants signed this oath?

Mr. Dreher: We have all signed it, sir.

The Court: Ladies and gentlemen, will you all stand and raise your right hand, just these folks who are going to canvass.

Do you Reinhold Dreher, Aaron A. Mappen, Paul J. Wendell, Abraham Leitner, Paul I. Krohn, Maria V. R. Pugliese, Jerome E. Turkel, Edward I. Rubinstein, Jerome Goldberg, Julian M. Weiss and Lillian Rodriguez, each and severally solmenly swear that each of you will individually and for him or herself fully and faithfully and with strict impartiality and to the best of his or her ability execute the duties of teller at the tabulation of the ballets of the American Society of Composers, Authors and Publishers in open court here, in the United States District [fol. 824] Court for the Southern District of New York at this time, January 6, 1960, at 10.00 a. m., and you faithfully swear now to carry out your duties, so help you God!

(All responded in the affirmative.)

The Court: I want again to say to you that each of you are functioning now as officers of the Court, and any wrong-doing will be in contempt of the process of the court, for which you may be summarily punished. You are functioning here as court officials under my order, and my order is that there shall be a fair and impartial canvass of these votes, and that you shall well and truly and accurately and honestly make a return as you so find it.

Now you understand the trust I am placing in you?

Mr. Dfeher: We do, your Honor.

The Court: I know you will fulfil that trust,

Now I think then you can get back out of this roped-off inclosure and we will continue the court in session while the canvassing is being done. When the canvassing is through I will come back on the bench and I will be here in the meantime at various times to see what is going on, to satisfy myself that the things are going on as they should. [fol. 825] I won't stay here all the time. I don't think it is necessary. But you folks may stay here, outside of the roped-off inclosure, and when that is done, we will announce the tally and the results of your canvass.

I don't think you need stay here, Mr. Reporter, at this time, and when I require your further services I will send

for you.

Now you men who are going to operate these slicing machines, better come up, and be sure you don't slice yourselves; just slice these envelopes, and when you have done that, you get back outside the roped-off inclosure.

All right. You boys can come down here now and we will file as an exhibit this oath of office that these men have just

taken.

(Marked Court's Exhibit F.)

The Court: Remember, the court is in session at all times while this canvassing is going on, and nobody is to interfere in any way with the canvassing.

(The following took place in the courtroom at 4.15 o'clock p. m.:)

The Court: Mr. Dreher, have you completed the canvass of the ballots?

Mr. Dreher: We have, your Honor.

[fol. 826] The Court: And have you made a tabulation? Mr. Dreher: I have my tabulation here, and I would like to pass it up to you. There are two copies. One is the checking copy.

The Court: All right. We will mark the copy signed by

you as an exhibit now.

(Marked Court's Exhibit G.)

The Court: We have another copy signed by Mr. Mappen. We will mark that Court's Exhibit H.

(Marked Court's Exhibit H.)

ANNOUNCEMENT OF SUMMARY OF VOTES

The Court: Now, it is my purpose at this time simply to read the summaries on these reports of the canvassing of the ballots. One copy will be available for the inspection of counsel after court adjourns today. After I read the summaries, I intend to adjourn court until tomorrow morning at ten o'clock, and at that time I will hear anybody who has an application to make.

At this time I will simply read the totals.

The total of writer-members voting "Yes" is 405,01012 votes.

There was a total of writer-members eligible votes of 495.411.

Percentage of writer-members voting "Yes" is 81.75. [fol. 827] One-half of that percentage is taken as a weighted vote, and that would be 48.88 percent of the writer-members votes which were cast for "Yes.

Now on the number of ballots of the writer-members which were cast, there were 2,976 ballots cast "Yes"; 1,285 cast "No"; 27 ballots were marked blank, and those 27 ballots which were marked blank had a total voting weight of 5,619.

On the publisher-members, the total publisher-members voting "Yes" by votes was 19,051. The total publisher-members eligible votes was 22,598.

Percentage of publisher-members voting "Yes" by the weighted vote was 84.30.

Then calculating one-half of that as taken, so that one half of this percentage of publisher-members voting "Yes" was 42.15.

Now on the publisher-member ballots, there were 652 members who voted "Yes." There were 440 who voted "No" and there were 18 blank ballots, with a total vote for the 18 blank ballots of 67.

There is a difference of 105 votes.

Mr. Dreher: Yes, your Honor.

The Court: The reported estimated vote as reported by the accountants prior to the opening of the ballots. That [fol. 828.] 105 difference is accounted for by the fact that there were a number of ballots on which the accountants had some question, and I felt that they should be counted—not counted at all, or did I rule that they should be counted?

Mr. Dreher: Counted.

The Court: Should be counted.

Mt. Dreher: Yes.

The Court: That increased it 105. In any event, the ruling that I made is so negligible in comparison to the total vote cast that it would make no difference.

However, to give you then the final summary of the voting on votes cast, one-half percentage of the writer voting members voting "Yes" is 40.88. One-half of the percentage of the publisher-members votes voting "Yes" is 42.15.

The percentage then of all members votes voting "Yes" is \$3.03 percent.

Apparently the predominant vote was in favor of this

proposed amended decree.

Now the clerk will keep one of these, and the other will be available for the inspection of counsel. In fact, if you keep them in your sight, let counsel look at either one, it [fol. 829] might help them, or if you want, we will be able to get photostats.

Mr. Dreher, you have one copy?

Mr. Dreker: I have one copy.

The Court: Have you some kind of a machine up in your place that makes copies?

Mr. Dreher: Not of these. These are already a machine copy. The form is a machine copy, your Honor.

The Court: All right.

Mr. Dreher: Your Honor, do you have any disposition for the supporting work sheets?

The Court: I was just going to take that up in a minute.

Now you have your work sheets, have you!

Mr. Dreher: Yes.

The Court: Work sheets shall be filed with the Court as exhibits.

Now I have signed an order, Mr. Dreher, giving you custody of the ballots and of the tabs.

Mr. Dreher: Very good, sir.

The Court: Do you accept this trust?

Mr. Dreher: I do, sir.

The Court: This means that you must keep them in a [fol. 830] safe place, not permit anybody to inspect them except on order of the Court, and not to destroy or mutilate any of them until further order of the Court.

Mr. Dreher: I understand.

The Court: If this order is not obeyed, the party who violates it will be guilty of contempt of the Court. You understand that?

Mr. Dreher: Yes, sir.

The Court: Again, I am placing my trust and confidence and the trust and confidence of the court in you and in your office.

Mr. Dreher: Thank you.

The Court: All right. Now today's date is the 6th, so you will file this order.

The Clerk: I will, sir.

The Court: Now these tallysheets with the tabulations, I think it best that they be kept intact. We will mark them as exhibits: There are two packs.

(Marked Court's Exhibits I and J.)

The Court: I don't think those tallysheets should be examined this evening. If anybody wants to look at them, we will try to make them available the first thing in the morning. But I feel it will lead to too much confusion to have them examined this evening.

[fol. 831] However the summary sheets of the balloting may be looked at, and if tomorrow morning any of you want to look at those tallysheets, you can make an application to me up in chambers before the court opens. I will be here, with the help of the Lord, at half past eight, and you can come in and see me.

Mr. Barrett, I wonder-where do you live?

The Clerk: Queens, Woodside.

The Court: Would half past eight be too early for you tomorrow morning?

The Clerk: Not at all, sir.

The Court: If you will be here tomorrow morning up in my chambers with these papers, I would appreciate it.

The Clerk: Fine.

The Court: And will you keep them overnight,

The Clerk: I will, sir.

The Court: Now the summary of the ballot sheets, these two exhibits that you have there—H and G is it—they may be inspected by counsel or by anybody in your view—you are not supposed to leave them get away—this evening. The individual ballot canvassing sheets may be looked at [fol. 832] tomorrow morning on application to me or an application made here in court.

Now we will adjourn now until tomorrow morning, Can you make it 10.30 tomorrow, gentlemen, instead of 10? Will

that be all right?

(All counsel indicated in the affirmative.)

Mr. Fishbein: Your Honor, may I ask one question while I am here?

The Court: Yes.

Mr. Fishbein: If I understood it correctly, there were 652 ballots, publisher ballots, cast "Yes" on the numerical, 440 "No" and 18 blank.

The Court: That's right.

Mr. Fishbein: Now, the eligible votes on the publishers as against the weighted vote was 22,598. Could we get the eligible votes on the publishers numerically? Has that been tabulated?

· The Court: What do you mean by numerically? How many publishers could have voted?

Mr. Fishbein: Yes, as distinguished from the weighted count on both the writer and the publisher.

The Court: Is that readily available? I think we have that.

How many publishers could have voted by number? [fol. 833] Mr. Mappen: 1,365.

The Court: 1,365 could have voted, and you say you have a total there that runs over 1,100?

Mr. Fishbein: Yes. Could I have the same tally on the writers eligible to vote, numerically?

The Court: Yes. You have 1,300. That 1,300 has not been broken down into groups, you know.

Mr. Fishbein: Yes, I understand.

The Court: What is your name, sir?

Mr. Fishbein: Arthur L. Fishbein.

The Court: And you represent whom?

Mr. Fishbein: Charles K. Harris Music Publishing, Southern Publishing Company, LaSalle Music Publishing.

The Court: You were heard at the last meeting?

Mr. Fishbein: Yes, on October 9th.

The Court: And I am hearing you now as a friend of the court.

Mr. Fishbein: Thank you very much.

Mr. Mappen: There were 5,092 available ballots of writers.

The Court: 5,092.

[fol. 834] Mr. Mappen: Yes, sir.
The Court: Of writer-members.
Mr. Mappen: Writer-members.

The Court: 5,092, and you had a vote cast of approximately forty-two hundred-odd.

Mr. Fishbein: 4,218.

The Court: I haven't pencil and paper and I just-hurriedly looked at the numbers.

All right then, gentlemen, we will adjourn until 10.30 if it is agreeable to everybody. Ten-thirty tomorrow morning.

(Adjourned to Thursday, January 7, 1960 at 10.30 o'clock a. m.)

[fol. 836] COLLOQUY BETWEEN COURT AND COUNSEL

The Court: We had, when we adjourned last evening, the canvass of the ballots filed, and they have been made available to anybody for inspection who wants to look at them.

Mr. Dean, I will hear you. I see you standing. You apparently have something you want to say.

Mr. Dean: I would like to hand to your Honor certification by Mr. Adams, the President of the American Society of Composers, Authors and Publishers, pursuant to Section VII of the proposed decree, the consent of the membership as required by the Articles, has been obtained. The Court: We will file that then as an exhibit in this proceeding.

(Marked Court's Exhibit K.)

The Court: All right.

Mr. Dean: I would also like to hand to your Honor a proposed order, that has been consented to by the Government and myself, as counsel for ASCAP, that changes the dates appearing, in accordance with the memorandum we submitted to your Honor, because of the change in time from the time of the entry of the order, from last October to the present time.

The Court: Well, I have examined these proposed [fol. 837] changes—dates. It is simply to make the decree more workable that these changes have to be made, and to conform with the time which has elapsed while this proposed

consent decree was pending before me.

I see no objection to this, and I will approve it.

· Mr. Dean: I have handed up, your Honor, this proposed order that has in it these changes of dates.

I would also like to hand to your Honor a form of order approving this proposed consent decree, and I would like to move the approval of the consent order, further amending the amended final judgment, entered in this court on March

14, 1950.

It recites that the ballots have been tabulated in open court on January 6th, and the court has found that as a result of the balloting of the total eligible votes of writer-members, weighted in accordance with the Society's present Articles of Association, 81.75 percent of the votes were east in favor of approving the proposed consent order, and that the total eligible votes of publisher-members, weighted in accordance with the Society's present Articles of Association, 84.30 percent of the votes were cast in favor of the [fol. 838] proposed said order and said amendments to the Society's Articles of Association; and that averaging these two results, as provided in the Articles of Association, that this represents 83.03 percent, which is more than was required by said Articles of Association to amend them.

. It also recites that the court has found that of the members actually voting, 2,977 writer-members and 652 pub-

lisher-members voted in favor of said proposed consent order of the amendments; 1,285 writer-members and 444

publisher-members voted against it.

And it recites the filing of the certificate by Mr. Adams, as President of the Society, that the consent order and the amendments have been duly submitted to the members and have been adopted?

MOTION FOR APPROVAL OF PROPOSED CONSENT DECREE

Mr. Dean: It is my understanding that counsel for the Government join me in moving that your Honor now sign the proposed consent order further amending the final judgment.

Mr. O'Donnell: Yes, your Honor, we join in that motion. The Court: I think at this time then any applications by any lawyer who requests to be heard as a friend of the [fol. 839] court should be entered, and I will hear them now.

Well, you are the nearest. Suppose you tell me what you have in mind and give your name and whom you represent.

STATEMENT BY MR. ROTHSTEIN

Mr. Rothstein: Sidney W. Rothstein, representing Gem Music Company, Denton & Haskins and Barney Young.

The Court: Mr. Rothstein, and counsel and other people who apply to be heard, I don't want any reiteration of extended arguments that we had before.

Mr. Rothstein: No, sir.

The Court: Carry on from that point and make any application you have.

Mr. Rothstein: I will apply myself solely to the vote

as was tallied yesterday.

The Court: Anything you have in mind that you feel is relevant, I will listen to you as a friend of the court.

Mr. Rothstein: And of course my position, as your Honor well knows, is to arge the court to unequivocally reject the proposed decree.

I urge firstly, sir, that the court accord no probative

value to the weighted vote, for this reason:

[fol. 840] The Government itself has found—and this is not controverted by ASCAP—that the weighted-vote formula as it now exists in ASCAP frustrates the intent

and purpose of the 1950 consent decree, which is still in force and under which we are still bound.

These statements are contained in the Government's memorandum, which was submitted originally in support of the proposed decree, because it is shown that less than one percent of the publishers have over 50 percent of the weight on that formula and less than 5 percent of the writers have over 50 percent of the weighted vote for writers.

Under these circumstances, it certainly appears to me that the weighted vote does not properly reflect the true sentiment of the membership of ASCAP, and it cannot properly so reflect it, and I therefore think that the court should completely disregard the results of the weighted vote.

The Court: Well, there is something that is fundamentally wrong with that position. In any corporation, where stock is widely disbursed and publicly held, the holdings are in varying amounts.

Mr. Rothstein: This is entirely different, sir.

The Court: Well, it is not entirely different. It is some-[fol. 841] what analogous. The weighted vote is in considerable extent and is measured by what the members' product produces by way of revenue.

Mr. Rothstein: In a corporation, your Honor.

The Court: In a corporation it is measured, the right to vote is measured by the amount of money—

Mr. Rothstein: That the stockholder has invested.

The Court:—that the stockholder has invested in the corporate affairs and in the corporate fund. And so here, too.

Mr. Rothstein: But this is not a profit-making organiza; tion.

The Court: To say that it is not a profit-making organization is just ridiculous. What is the twenty-seven-odd, twenty-six million dollars that is collected each year? Is that a loss? It is a business venture.

Mr. Rothstein: Not for the benefit of the organization as such.

The Court: It is for the benefit of those who have contributed to the common fund.

Mr. Rothstein: Of course.

The Court; And their contributions have been by a con[fol. 842] tribution of property rights. A copyright is a
property right; a right to public exhibition is a property
right; and it is definitely measurable in law in terms of
dollars and cents. We do it every day here. You know that
as an expert, as I recognize you, in the copyright field.
And for you to say, number one, that this isn't a profitmaking organization, is not—

Mr. Rothstein: I mean not in the sense of the organiza-

tion itself.

The Court: —is not being properly realistic; and for you to say that the revenues or collections shouldn't bear some relation to what each has contributed to the means by which

these revenues are gathered, is not realistic.

Mr. Rothstein: No, sir; but if the formula on which that relationship is presently based is found to be inequitable and unjust, then I say any results based on that formula should not be considered by the court because that is one of the reasons why we are here today attempting to amend that decree.

The Court: Well, I indicated at an early date that I was not going to attempt to regulate too much the internal affairs of ASCAP; that my concern with their internal [fol. 843] affairs was solely confined to the enforcement of our antitrust laws. Now if any party that you represent wants to withdraw, they now have that permission; they can withdraw from ASCAP any time they want to. They have an unlimited right of withdrawal. They don't have

My reaction, when I first read this proposed an ended final judgment, was that it was, number one, an improvement over the present decree; that perhaps it wasn't perfect, but that there has to be somewhat of a trial-and-error procedure followed here. The Government has examined this; they have studied it, they have had experts, they have had economists and analysts look over this proposed amended decree, and I have every reason to believe that the Antitrust Division is fulfilling the purpose of its function advisedly and to the best of their ability, and if this system

that is now being set up doesn't work, we will find it out

and it will be changed.

The decree provides, as I recall, for the appointment of experts who are to watch and see how this functions and to give a report to the court; and I indicated before that I in-[fol. S44] tended not to appoint another expert to supervise the work and the workings of this plan of distribution, which we are now setting up, but I intend to appoint two practical, fair-minded, impartial men, in whom I have implicit faith and confidence, both as to their honesty, their integrity, their personal integrity, and their business judgment; and I indicated before that if these men would accept the designation, and the time came when I would have to make such a designation, I would appoint a former justice of the Supreme Court, John E. McGeehan, and former United States Senator Irving Ives.

When I spoke to them about it several months ago, neither one of them was too enthusiastic about taking the designation and the appointment, but I feel that there is an opportunity for public service for these men, and they both gave me their consent several months ago. I hope they haven't changed their mind in the interim. I haven't spoken to

them for several months.

Now this proposed decree, final judgment, is the result of negotiations which were carried out at arm's length by the Antitrust Division. It is what you yourself tried to accomplish in some measure some months ago, some many [fol. 845] months ago, when you sought to intervene, didn't you?

Mr. Rothstein: Yes, I sought to intervene.

The Court: And I felt at that time-that this matter was being taken care of by the Antitrust Division. The only complaint I make about them is that they bring too many of their suits here in New York, in the Southern District. I found them diligent, I found them fair, and I have found them most competent, and I think that their competency and their diligence and their fairness is reflected in this proposed consent decree, and that was my reaction when I looked at it.

Mr. Rothstein: I would like to make this further comment, sir, and that is this. ASCAP is a voluntary, unincor-

porated association. Therefore, in effect, all the members of ASCAP are, in reality, defendants in this case. Now as such defendants—

The Court: Well, juristically, they are not defendants in a federal court. Where men in business enterprises have combined into one association, under federal practice they are recognized as a juristic person.

Mr. Rothstein: Yes, sir, but that is procedural only and

does not affect the substantive law.

[fol. 846] The Court: Well, if it doesn't, then you are the first one to question it in almost twenty years of operation on a consent decree. This decree, which is now being further amended, was first entered in this court in 1940.

Mr. Rothstein: I am not questioning the jurisdiction of the court to enter the decree, because certainly an association may be sued in its own name. I am merely pointing out that in effect the members themselves are the defendants, and as defendants their potential liability is not measured or proportioned by the weighting classifications they have in the Society. That is the only other point I wish to make.

The Court: I don't feel that it is a realistic approach for you to say "We shall count the members of ASCAP by head only," and say, "Numerically, there are so many members of the Society" without taking into account their contributions. You yourself may get an inspiration and come forth with what you believe to be a melody.

Mr. Rothstein: Not me.

The Court: Well, you may. You can never tell what the future folds forth in the shape and form of these strange [fol. 847] events. You may conceive yourself to be a musician tomorrow, or I may—suppose I make it more personal, myself—if I came out with some melody and somebody loves it on television solely by reason of admiration for the theme and for the syncopation presented in my composition, and that is my one and only effort, I certainly shouldn't have as much to say as an Irving Berlin, should I?

Mr. Rothstein: Well-

The Court: I might have as much to say, I might have more to say, but I shouldn't have the power to carry out my wishes in any proportion to men of that type.

Mr. Rothstein: I don't know if your Honor is aware, but up until about twenty years there was no weighted vote,

it was a vote by unit.

The Court: I remember prior to the Hotel Vanderbilt case, everybody was playing everybody else's songs and the writers and composers were getting nothing. You remember that; I think you are old enough to remember that. At least you have studied it in the law books.

Mr. Rothstein: I have studied it. I don't remember it

personally.

The Court: Those were exciting days.

[fol. 848] Mr. Rothstein: Yes. I wish to say this further, your Honor. In my opinion there has been no consent evidenced here on the part of the defendant.

The Court: I hold the contrary view.

Is that all you have to say?

Mr. Rothstein: May I state why I feel there is no consent?

The Court: Certainly.

Mr. Rothstein: I will not take more than two minutes to state it.

The Court: Certainly.

Mr. Rothstein: Less than 50 percent of the publishers eligible to vote actually voted in favor of the proposed decree. Even taking it on the proportion of those who actually did vote, less than 60 percent of the publishers voted in favor of the proposed decree.

The Court: Now wait a minute. Just stop right there. When you say "eligible to vote" it is similar to our elections. Not every eligible voter exercises his right of franchise.

Mr. Rothstein: True, sir.

The Court: And yet we have to take the will of those who do exercise their right of franchise.

[fol. 849] Mr. Rothstein: I use that figure, too, your Honor.

The Court: Now here, even on the number-

Mr. Rothstein: Less than 60 percent, a fraction under 60 percent, unless my mathematics are inaccurate—

The Court: No, I think it is just about 60 percent.

Mr. Rothstein: Yes, sir,

The Court: There were total votes of the publishers number voting "Yes" of 652, and there were 440-

Mr. Rothstein: I have 40.3 percent opposed but I won't

quibble over that .3 of one percent.

On the writers who actually did vote, approximately 58 percent, or rather, approximately 68 percent or 69 percent voted in favor-approximately 58 percent of the total eligible writers voted in favor.

Now, of course, your Honor, we are concerned with the concept of a consent decree, and what is a consent decree? The word implies consent, permission, and it is a simple word, very easily susceptible of definition, and I am very strongly urging that where-

[fol. 850] The Court: Yes, but where these men and these writers and these publishers have by their own agreement

said to us, "What should constitute consent"-

Mr. Rothstein: And the Government has found that ASCAP violated that, in its own memorandum, which has been submitted to your Honor, and I emphasize this point for this reason: the consent decree we are concerned with today presents a sort of anomalous situation. I don't think there is any similar consent decree existing anywhere in any of the courts in this land, and in this respect: the decree seeks to protect the users of music against the practices of ASCAP, and at the same time the decree is giving protection to the members of ASCAP themselves, who are really the defendants, against the actions of the management of ASCAP.

The Court: I wonder whether at times the members of ASCAP, even those whom you represent, fully appreciate the burden that has been cast upon the court by reason of their own wrongdoing, and what the court is doing to see that their investments bring a return? I wonder if you men who represent these principals, these writers and these publishers, ever explained it to them in detail that ASCAP has in effect an unpaid czar of its industry, paid and sup-

plied by the Government?

Mr. Rothstein: Well, we are well aware of that, [fol. 851] sir.

The Court: Do you know that during the past year I have devoted over one month of judicial time simply in

fixing fees which ASCAP should collect from the various fields of endeavors, from the radio stations, the television stations, for the use of Muzak; and that if the court didn't undertake to do this work, you wouldn't be collecting your \$26 million that you are dividing? You know, this is an intolerable burden that has been east upon this court, and I don't know whether such a burden was ever within the contemplation of those who originally voted and passed this law when it was first put on our books.

Mr. Rothstein: Well, I would say, in all probability it

wasn't, but-

The Court: I am glad that you and I agree on one thing. Mr. Rothstein: No, but I wish to emphasize, your Honor, that this decree in part exists for the protection and the benefit of the members of ASCAP themselves. That is, regardless of the weight and classification that is accorded to them in the Society, each and every member of ASCAP, [fol. 852] even the lowest classification, is entitled to the benefit of this decree, because the decree gives it to them. And where you have such a large number of members, numerically, who are opposed to this decree, then I say to your Honor that there is no consent, and I say also to your Honor that under the meaning and the interpretation, as I read it, in the language of Rule 24 of the Rules of Federal Civil Procedure, that the Government has not adequately represented the interests of these people.

The Court: Oh, I think the Government, the Antitrust

Division, has done a splendid job.

Mr. Rothstein: I am not talking about their efforts, Judge. What I am saying is when there is such a degree of dissention and disagreement with what the Government has done—

The Court: Why don't those who don't want to stay in

ASCAP get out of it?

Mr. Rothstein: Because they can't. I am not saying they can't physically, of course.

The Court: A number of them did. Mr. Rothstein: They can resign.

The Court: A number of them are already out of it. They are connected with your competitor, the Broadcast [fol. 853] Music.

Mr. Rothstein: Your Honor, Broadcast Music is not a writers organization. Essentially it is a publishers organization.

The Court: Well, I have my ideas of what it is essen-

tially, but it is not performing illegally.

Mr. Rothstein: I mean in its practices—I didn't mean legally—I mean in its practices; and the great bulk of its money goes to the publisher-members and not to its writers. In effect, as a practical matter, there is no place for the writer to go outside of ASCAP. He can't go any place. There is no question that if there were a place to go he would have gone. In fact, in about 1936 the Warner Bros. companies, which are the biggest single unit in ASCAP, withdrew from ASCAP, and even such a powerful combine found they could not buck the system—that was before there was a BMI—and within one or two years they had to come back to ASCAP and seek membership again; they couldn't exist without ASCAP. That is the case with the individual writers as well. There is no place for them to go.

The Court: Frankly, I don't know how long this ASCAP situation is going to continue. I think it calls for remedial

[fol. 854] legislation.

Mr. Rothstein: That is my own opinion.

The Court: Of what nature, is not for me to determine, but I think under our present law and under the facts now before me, this decree should be approved.

Mr. Rothstein: Well, I have stated my position in op-

position.

The Court: All right, Mr. Horsky. You don't have to come up here and use that lectern if you don't want to, or if you feel better off, come up and use it.

STATEMENT BY MR. HORSKY

Mr. Horsky: Quite all right to speak from here, if it is all right with you, sir.

The Court: All right.

Mr. Horsky: I will be very brief. I have only one basic point that I really wish your Honor to give serious consideration, and I am aware of the debates we had on October 20th as to the alternatives before your Honor, if this decree were not approved.

What I would like now to call to your attention, sir, is the fact that we now have a real additional alternative which was not then apparent. The result of the vote which was announced yesterday afternoon in court shows that there is in ASCAP now not merely a few dissident, dis-[fol. 855] loyal, unhappy people, but that there is in ASCAP a vast group, spread, as the tabulation before you will show, throughout the categories in ASCAP, the big publishers, the little publishers, the big writers and the little writers, who join with the people whom I represent in hoping that this decree will not be approved.

Now that group represents on an overall basis some third of the total membership, and it represents a larger propor-

tion, indeed, of the publisher-members.

That leads me to say this, your Honor. You have before you now one further alternative. These people who have negotiated this decree now know for the first time the extent to which it does not command the enthusiastic support of the members of ASCAP. It would be incredible to me if the Board of Directors and the officers of ASCAP, to say nothing of the members of the Department of Justice, were they to sit down again and renegotiate further on the matter of this decree, would not feel it wise, would not feel it, in fact, essential, to come to some further agreement which would command a measure of much larger support from the members of ASCAP than this proposed decree has commanded, as this election shows. That negotiation [fol. 856] could be done promptly. If I am wrong in what I suggest would happen, the most we have lost is a little. time. If I am right, and this further negotiation, which would be made possible if you would suggest to them that this consent does not seem to you the kind of consent that a decree of this sort should command, that further negotiation might produce, might well produce a decree which would let the membership of ASCAP really get together and march forward in progress and in agreement, as I am sure that they all would love to do.

Now that, your Honor, seems to me to be a real alternative which is open. It requires for it to be accomplished, only that you suggest on the basis of this election that there is throughout ASCAP too much disagreement, too much

unhappiness with the decree which is before you now, for you to say that "I think I will sign it without more ado."

The renegotiation need not take long, and I may be overly optimistic but the most you would lose by that mode of conduct is that he will just report back to you further that nothing could be done. I don't believe that would be true because I don't believe these people on the Department of Justice side and on the side of the officers and directors of [fol. 857] ASCAP fully appreciate the degree to which the entire membership, not just the little ones, not just the people who had no particular interest in ASCAP because they had only one vote, but the people all up and down the line, disagree with the principles and with the results that had been reached in these negotiations. That is a very new fact and it is a very significant fact:

Now let me say only a word, your Honor, on why these figures are perhaps even more meaningful than they appear

on their face.

The Court: Well, let me interrupt you just a moment.

Mr. Horsky: Yes, sir.

The Court: Let me tell you that this matter has already been pending before the court, and has been under consideration by the court since the latter part of June.

Mr. Horsky: That's right, sir.

The Court: So that the action that the court takes is not hurried, rash or without due consideration.

Mr. Horsky: I made no such suggestion, if your Honor

please.

The Court: That is the first observation I have to make. [fol. 858] The second observation is this. That you are dividing approximately 24 or 25 million or 26 million—I don't know how much it is; it goes up each year—among 6,000 people, six thousand-odd people, writers, publishers, individuals, estates and corporations, widows and orphans, and those who are otherwise situated.

Now when you divide that amount of money amongst that number of people, human nature is such that you are not going to get any extent of unanimity of opinion because few men are content with what they receive in this life, even though their neighbors may feel they are getting far

more than they ever either earned or deserved.

Now I am surprised that there is such a large number who have consented, because it shows that even balancing their own selfish interests against the proposed plan, they have determined, "Well, perhaps this isn't as much as we should get, but we think it is fair."

Now this isn't any permanent arrangement in that it presents an irrevocable situation; we have provided—and at this point I am looking through the decree and I don't

see the provision in here—for the appointment of these two sort of supervisors.

[fol. 859] Mr. Bean: Section II, subdivision (C), your Honor. It is on page 4 of the printed proposed order I handed you this morning.

The Court: I am going to change that and make it "two

qualified independent persons."

Mr. Dean: That is agreeable to the defendant, your

Honor.

The Court: And it is provided that they shall examine—the way this operates and the way I contemplate it, is that they shall file a report so that we can see how it is operating.

Mr. Dean: I have here a proposed form of order for your Honor's consideration, pursuant to that section.

The Court: And I suppose I look at it and read if out

to Mr. Horsky and see what he thinks about it.

It recites the provision I have no doubt you are familiar with, Section II, subdivision (C), and the order part reads that "The Hon. John E. McGeehan and the Hon. Irving M. Ives, each of whom is a qualified independent person and not an employee of either of the parties, are hereby appointed to examine periodically as is necessary the design and conduct of the survey provided for in Section II, to [fol. 860] make estimates of the accuracy of their sample and to report thereon to the court."

And "It is further ordered that the Society shall pay the salaries and the reasonable expenses of said persons, the salaries to be fixed by the court upon the application of

the persons or the defendant ASCAP."

Now, we contemplate not an irrevocable situation, but we contemplate by this decree a change, which I feel is a change for the better, and we are going to see how it works out, and we are going to get the reports from these men to I don't say and I don't find that this plan, which we are now putting into effect, is forever going to remain the plan in operation, but it is a plan that we are going to work under and we are going to see how it operates. We are going to see if it is an improvement, and by the operation of the plan we will see whether there are any further improvements required.

[fol. 861] Now, I can't see anything wrong in that.

Mr. Horsky: Well, that, I agree, is good, your Honor.
The Court: That, in substance, is what you are asking me to do.

Mr. Horsky: No.

The Court: So I am, in substance, doing just as you

request.

Mr. Horsky: No. I am making a wholly different suggestion, your Honor. I am suggesting to you that when there is submitted to you a plan which, after vigorous campaigning by the Board of Directors and officers, can command no more than a 56 percent approval of the members of this Society, that it would be perfectly appropriate, and indeed, highly desirable for these negotiators to try and again see if they can't get one that will command an additional 25 or 30 percent. Certainly you will never get unanimity on the plan, and none will ever expect that all of the members of the Society will agree.

The Court: No, but you have lost sight of the fact—I don't think you have lost sight of it; you are too astute a lawyer to lose sight—and too able a lawyer to lose sight of it—but perhaps I should say you don't give due weight [fol. 862] to the fact that (1) there is a consent decree,

and the parties defendant have to consent to this.

Mr. Horsky: No. I have said to your Honor—let me repeat what I said, because I want to be sure you understand my point. I don't believe that at the time that this decree was negotiated by these parties, and I am including the defendants, your Honor, as well as the Department of Justice, there was any belief that so large a number of

members of the Society would disapprove it; that it would command the support of so few members of the Society. That fact became known yesterday for the first time. That fact became known as a result of your Honor's own suggestion. We had a head count as well as a weighted vote.

The Court: It became known factually and was established factually but realistically, looking at the situation, anybody with experience and common sense would say that it would be even most difficult to get a majority, much less 58 percent, to agree on how \$24 million should be divided

Mr. Horsky: I don't believe that, your Honor. I really

don't believe that.

The Court: Well, I think you don't give due weight to human cupidity.

[fol, 863] Mr. Horsky: I believe, your Honor, that in most societies which have-

The Court: Which have money.

Mr. Horsky: -which have money and which are dividing up properties, if the members have confidence in the way the society is run, if it is democratically administered and they can throw out the people at the top if they don't like the way they are running it, they will be content with the constitution. You can get an agreement on what a constitution should be, which is what this consent decree is.

The Court: In many of our own public elections, aren't the elections determined by a very small percentage of the

majority of those voting?

Mr. Horsky: Not very small in this country, happily.

The Court: Well, you would be surprised. If you look at the history of New York, you might find differently, particularly on a state basis.

Mr. Horsky: But in this situation-

The Court: And if you take the popular vote throughout the country, even on a high federal office, you will find that the popular vote differential is far closer than the [fol. 864] presidential electoral vote.

Mr. Horsky: Certainly, but what I want to be sure of is that you understand my point. I have a point that I want to be sure you understand. If you reject it, very well, but I hope I wen't have to sit down until I am sure I have gotten

across to you.

The Court: I think you have to give me credit for understanding what you have so explicitly set forth. I give you credit for being able to very efficiently and competently set forth your views. You have done that.

Mr. Horsky: Very well.

The Court: I hope that you give me some measure of credit and some measure of understanding. I do understand your point. I don't agree with it.

RENEWAL OF MOTION TO INTERVENE AND DENIAL THEREOF

Mr. Horsky: Very well. If that is a fact, sir, that is

all I need to say.

Let me, in conclusion, because I am not perfectly certain as to either the nature of the record that has been made here, or my particular status, renew my motion for leave to intervene at this time.

The Court: Yes. Your motion to intervene is denied. You had better state on the record who your clients are. [fol. 865] Mr. Horsky: I have already done so in the earlier hearings, sir. They are unchanged.

The Court: They are unchanged.

Mr. Horsky: Yes.

The Court: Your motion to intervene is denied, and your clients have surrendered their right to appear individually in this suit by subscribing to the Articles of ASCAP, and I have heard you as a friend of the court.

Mr. Horsky: Yes.

The Court: And particularly since the case has proceeded to final judgment we cannot in an instance such as this permit intervention, and except in such cases where there has been a showing that the Government is failing to fulfil its full duty and obligation, and there has been no such showing, and I so find.

Mr. Horsky: Right.

May I now ask another question?

The Court: You have an exception to my ruling.

Mr. Horsky: I beg your pardon?

The Court: You have an exception to my ruling.

Mr. Horsky: Thank you.

The Court: And you want to present a formal order you may do so, but it is not necessary.

[fol. 866] Mr. Horsky: All right.

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The Court: I formally deny upon the record your application to intervene as a party defendant in this suit.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Horsky: May I move to another subject, your Honor?

The Court: Yes.

Mr. Horsky: At the hearing on October 20th Mr. Dean stated-and I think the page reference is-

The Court: What date? The 20th?

Mr. Horsky: Yes. The Court: Yes.

Mr. Horsky: -at page 329 of the transcript, that in connection with the new election procedure, in which 12 percent of the votes are entitled to nominate and elect as director, that he would be glad to have the Society-and I read-"We will arrange for these members who wish to. get up such a petition to sign it secretly, and the ASCAP Board will have it examined by an independent board of auditors without indicating the names to the ASCAP directors so that there won't be any fear of reprisal."

The Court: Wait a minute. I don't see where that is. Mr. Horsky: Pages 329 and 329-A of the transcript of [fol. 867] October 20th hearing. I will hand this up to your

Honor, if you would like to have it.

The Court: I guess you have the same as I have.

Mr. Horsky: Have you October 19th? The Court: I have October 20th.

October 20th, page 329.

Mr. Horsky: The very bottom of the page, your Honor.

The Court: I see it, the last paragraph.

Mr. Horsky: Yes.

The Court: I have it.

Mr. Horsky: My request, sir, is whether you would be willing at this time to suggest, or maybe we can arrange to have the Golinko Company be the people who would undertake that responsibility for ASCAP, in view of the splendid services they have rendered on this previous election.

The Court: I don't recall just what this concern. Now

what do you want?

Mr. Horsky: There is a provision in the decree which provides that upon petition filed by publishers or writers, representing 12 percent of the weighted vote, a director may be designated by them as their director. They will then become ineligible to vote in the general election for [fol. 868] directors. The charge is made that this would be difficult of accomplishment because of the fear of reprisals of people who in effect fought the official slate of directors, and Mr. Dean stated, as I say, that he would arrange therefore, in order to avoid any fears of reprisals, that petition, which would be circulated necessarily to obtain this 12 percent of the total weighted vote, could be done secretly and would be examined secretly by an outside firm of auditors.

My request is only that at this time may it be made clear

that the Golinko firm should be that firm?

The Court: Well, I haven't any request before me, have I? Mr. Horsky: I am just trying to clarify the situation.

The Court: As I understand it, the proceedings that you contemplate, it would be that if 12 percent of the voters, those entitled to vote, 12 percent, would sign a petition in order to determine whether or not it was 12 percent, that would be checked up by an independent accountant.

Mr. Horsky: That's right.

[fol. 869] The Court: And they would file a report.

Mr. Horsky: That is what Mr. Dean suggests... The Court: Well, are you still of that opinion?

Mr. Dean: Yes, I confirm that. I confirm what I said at page 329 and 329a on October 20th.

The Court: Well, I don't see any occasion at this time

to sign an order on that.

Mr. Horsky: No, no. I think if we all understand it, your Honor—

The Court: I would be inclined, if a petition were filed, on notice to me and to the parties to the suit, to ASCAP and to the Government, to have it examined and checked over confidentially by Golinko & Company and let them file a report to me. The report will state whether or not there were 12 percent by way of votes who have signed this petition.

Is that correct?

Mr. Horsky: That's correct.

The Court: And would the petition be kept secret?

Mr. Horsky: That is what Mr. Dean suggests, and I certainly endorse that.

Mr. Dean: Yes, it would be kept secret, your Honor. [fol. 870] The Court: Secret from whom? Who would be entitled to have it?

Mr. Dean: Well, it has been stated here that this provision—it is on page 11 of the printed decree; it is subdivision (E) of IV, that any group of writers entitled to cast 1/12 of the votes could get up this petition, and somebody said, "Oh, well, that is meaningless, and it is hogwash because the writers would be so afraid of reprisals from the Board of Directors that they wouldn't dare do it."

It was at that point I got up and said, "Well, if they want to do it, we would be quite willing to have an independent firm of auditors examine that petition, so that the names of those people will be kept secret from the Board of Directors, so that there will be no fear of reprisal."

The Court: I just want to see how this would work. I don't want to complicate the situation by having it affect our present proposed amended consent decree, but I don't see that there would be any objection if your principals, Mr. Horsky, presented a petition and said that you represented parties whose names you would disclose to the court in confidence, so that I can send it to Golinko, then we could [fol. 871] have it checked up to see whether or not they did constitute 12 percent of the vote, and once that has been done, then a director would be elected by that 12 percent, but at that point then—

Mr. Horsky: At that point the secrecy has to stop.

The Court: -at that point there would be no secrecy.

Mr. Horsky: That's right.

The Court: You understand that...

However, I am not going to rule on that now. It is not before me officially and formally. I will rule on it when it does arise, and I don't like to make rulings on hypothetical situations.

Mr. Horsky: This is not hypothetical, your Honor.

The Court: Well, it is hypothetical in that it is not before me.

Mr. Horsky: Yes. This is merely-

The Court: You agree with me, don't you?

Mr. Horsky: This is merely to try to tidy up the procedure which we have agreed on.

The Court: It is hypothetical because I have nothing

before me.

Mr. Horsky: That's correct.

[fol. 872] The Court: So that from a juristic point of view, you and I, as members of the Bar, have to accept it as a hypothetical situation. I am not ruling on hypothetical situations.

However, I will go so far as to say this, I will be inclined to accept the statement of Mr. Dean's and your request now as being a great measure of guidance as to the course I might take.

Mr. Horsky: Yes, sir.

I should also like to point out for Mr. Dean that when I make such an application, I will also add that of course

it wifl be necessary—

The Court: Well, you can point out to him all these matters in private or by letter but I don't think you should point them out now, because the matter may come before me for determination, and I prefer that it come before me on formal papers.

Mr. Horsky: Very good. The Court: Yes, sir.

STATEMENT BY MR. ANDERSON

Mr. Anderson: May I be heard?

The Court: Certainly you may. What is your name, sir!

Mr. Anderson: My name is Roy Anderson.

The Court: Mr. Anderson, you were here at the last [fol. 873] hearing, as I remember.

Mr. Anderson: I was here yesterday.

The Court: You are not a member of the Bar, are you?

Mr. Anderson: No, sir, I am not. I represent a group of people.

The Court: Well, do you represent yourself?

Mr. Anderson: No, sir.

The Court: Have you any interest in this yourself?

Mr. Anderson: Not from the commercial point of view.

The Court: Well, then, I can't very well hear you because if I did, I would let you be practicing law without a license.

Mr. Anderson: Can I serve as attorney for these people

in the absence of-

The Court: Are you a member of the Bar? Mr. Anderson: Well, I am a citizen, sir.

The Court: I know, but if every one of our citizens came in here and wanted to be heard, I wouldn't be able to do much.

Mr. Anderson: I don't want to be heard, your Honor. I wanted a point of information from the court.

[fol. 874] The Court: Well, I am not here to answer questions except—

Mr. Anderson: You see, I don't know the legal termi-

nology but-

The Court: I suppose the quickest way would be to ask you, Brother Anderson, irrespective of your right to be heard, just what is on your mind.

Mr. Anderson: I hope it isn't to be considered presumptuous, but we have a little citizens music committee that we have organized and—

The Court: Who is "we"?

Mr. Anderson: Well, I have the names here in case they want to be read into the record.

The Court: Where is this organization?

Mr. Anderson: In Mount Vernon, New York.

The Court: Mount Vernon is next to my home county, where I have lived all my life. It is next to the greatest county in the country.

Mr. Anderson: Well-

The Court: You know what county I refer to, don't you? Mr. Anderson: Yes.

The Court: All right.

Mr. Anderson: Well, I was designated to come down [fol. 875] here and if possible inject myself—

The Court: Are the people you represent just music lovers?

Mr. Anderson: Plain music lovers, and we characterize them as listeners, radio and TV listeners.

The Court: All right. I play the stereo—I don't play it, but they play it at home and once in awhile it is real entertaining.

Mr. Anderson: Once in awhile.

The Court: Yes.

Mr. Anderson: Well, the point is a very simple one, and that is I think many people often wonder why they don't hear certain music over the airwaves, and the average citizen—

The Court: A lot of people wonder why they do hear.

certain music. It works both ways.

Mr. Anderson: —and in that this antitrust action has been taken and concluded in 1950, indicating that ASCAP is a monopoly, I suppose that would mean that ASCAP has a monopoly of American music, so that acting as a monopoly, I assume the Antitrust Division acted in the public interest. But we wonder if the public interest isn't not also served in the listening end, and we have made a request [fol. 876] to ASCAP for a list of the 400, 500 top-rated ASCAP tunes that are supposed to represent what the public wants in hearing, and we are hoping for a favorable reply.

Now what we would like to know is, what are the toprated ASCAP tunes! And by knowing that we would like, to find out if the public really recognizes them as music

that it takes to its heart and loves.

For instance, why we no longer hear songs like

"Macushla".

The Court: My goodness, you don't go to the right gatherings. In my county we have a fine Hebrew baritone that sings it at all the Jewish dinners.

Mr. Anderson: Well, that was just one tune. That happens to be my favorite tune. But there has been no way of

ascertaining what the public interest is.

The Court: Well, really, Mr. Anderson, I don't think that what you have in mind, while I am most sympathetic to you—and I hope that you are not a publisher of these songs—

Mr. Anderson: I am not.

The Court: —that they get out and hand out at conven-[fol. 877] tions, that everybody sings together.

Mr. Anderson: No, I have nothing to do with publishing. The Court: Really, what you have in mind is not before me, Mr. Anderson.

Mr. Anderson: How would we go about getting the information?

The Court: I can't answer that. You'd better get hold of Mr. Finkelstein and Mr. Dean. Maybe they can give you the information. However, there is some dispute as to what is a top-rated tune, you know. You have read about it in the newspapers, I assume.

Mr. Anderson: Yes.

The Court: And who rates them and why.

Mr. Anderson: That was the thing that we were interested in. We thought the public should be given an opportunity to hear these tunes and see if they can really identify them, or whether there is something that is being artificially induced through the various means at their disposal.

The Court: I suppose there is a little bit of artificial inducement in all business enterprises that have something to

sell.

Mr. Anderson: We recognize that.
[fol. 878] The Court: Even toothpaste.

Mr. Anderson: Of course.

The Court: Glad to see you, Mr. Anderson, but really, what you have in mind is not a matter that is before me.

Mr. Anderson? I thank you for the privilege of saying a few words.

The Court: Well, I am glad to have you here. Now does anybody else desire to be heard?

STATEMENT BY MR. DEAN

Mr. Dean: I will be very brief, your Honor.

I merely wanted to say that when I was first retained in this matter by recommendation of Mr. Finkelstein and Mr. Cutler, I had no previous acquaintance in my practice with the performing arts—I have had some experience with the antitrust field—and I had been listening to the problems and became convinced that there was a public service to be performed in trying to work out a consent decree here, if we could work it out, with the Government.

But in discussions with Mr. Finkelstein, Mr. Cutler and the Board of Directors, I also had the temerity to suggest that I might be free in the course of this to make suggestions that I thought were in the public interest, and they agreed.

[fol. 879] I might say that I have studied this consent decree; I have understood its social consequences, and its

effect upon the public.

We have had some 30-odd conferences with Mr. Bicks, Mr. Kilgore and Mr. Karsted, and John Wilson, who is in court here this morning, and there were pretty spirited exchanges, and since neither they nor we knew too much about how music was made, upon my recommendation the Board of Directors retained Joel Dean Associates, who, as I say, was no relation of mine but a very able and statistical organization in this field, and we have had the benefit of Joel Dean's advice continuously, and we have brought him down to these conferences with the Department of Justice, and we have conferred with, tried to study this situation and tried to represent all of the interests of all of the members of ASCAP.

Now, I think it is significant that with respect to each of the participating classes, both the writers and the publishers, that there has been a majority in each of the separate classes. I think that is very significant; that those having one vote, those having 2 to 5 or 6 to 25 or 26 to 50, 51 to 100, 101 to 250, and over 250, that in each of those [fol. 880] classes we had a majority, and the same is true

with the publishers.

Now one of the things that the Department of Justice, of course, brought to our attention—there were dozens of others—and I might say that Mr. Wilson made himself a real expert in the field of the performing arts and on the subject of ASCAP, and was always exceptionally well-informed and very spirited in our conversations on this subject—was that they felt that there was too much money being given to the older writers or the older works, and that it was too difficult for a younger writer to become qualified, and that it was too difficult for an older writer's works to go down, and finally we worked out an amendment valong those lines.

I naturally knew that that was going to be harsh on some of the widows or the children of song-writers who are deceased, who are no longer creative, and it is interesting to me that even in that class we got a majority.

Now, when you are trying to work this out for the benefit of the younger writers, in an effort to encourage younger writers, or in an effort to encourage writers to stay in the songwriting profession, there being only so much [fol. 881] total money, naturally, that which you give to a younger writer comes from the older writer, and no matter how you work out these percentages, whatever you give to one class naturally has to come from another class.

I would say that the Department of Justice has fought very hard on this matter. We have done our level best to give them all of the information at our command, and I agree with your Honor, I don't say that this is the best decree that could be worked out under all possible circumstances, but I honestly don't believe—and I say this to Mr. Horsky, that I honestly don't believe that if we sat down and worked for another year, while we might change it in certain respects, that you could change this thing materially.

Well, the Department of Justice has got the right to come back within 18 months, and your Honor, as a chancery judge, always sort of keeps control of these proceedings, and I say to your Honor and I say to Mr. Horsky and all of the members of ASCAP, that I honestly believe that this is the best decree that we could work out under the circumstances, and I know that the Government joins with me in recommending that the court sign this proposed consent order.

[fol. 882] I honestly do not believe that if we sat down and worked on it for another six months or another year that

while you might change it in some details, I don't believe you will change it in its fundamentals.

One more sentence and I am through. Mr. Rothstein said that ASCAP admitted that the voting procedure was inequitable. We do not admit that. We think that all things considered, that the voting procedures asked, as set forth in this consent order, is equitable, and I understand the Department of Justice, in approving this decree, goes along with us in that statement.

Thank you, your Honor.

The Court: Do you wish to be heard, Mr. O'Donnell?

STATEMENT BY MR. O'DONNELL.

Mr. O'Donnell: I think, your Honor, that it was sort of flash of genius on the part of the Court to call for a numerical counting of the votes.

The Court: I don't like to be called an inventor.

Mr. O'Donnell: That device has completely exploded that myth that we heard so much in October, that this proposed judgment did not represent the will of ASCAP but merely the will of the Board of Directors. I don't see how [fol. 883] any responsible person can ever urge that again after the results yesterday.

During the balloting, the only thing that disturbed me was something I read in the papers. I heard that there was some criticism of the fact that the President of ASCAP had put an improper pressure on the members by suggesting that dissolution might be around the corner if the new judgment was not brought into safe harbor. I think that he would have been guilty of a very shocking neglect of duty if he had not mentioned that possibility to the membership.

The Court: I think he reiterated the thoughts publicly

expressed by the court. .

Mr. O'Donnell: I think so?

The Court: I think the members of ASCAP were entitled to know, and that it was my duty to advise them of all the alternatives that had to be followed here.

Mr. O'Donnell: I think so, exactly.

Now, just as we did in October, we very strongly recommend that this proposed judgment be entered.

STATEMENT BY MR. ZISSU

Mr. Zissu: Your Honor, may I raise one point here? [fol. 884] The Court: Nes, sir. Your name, sir, so we have it on the record?

Mr. Zissu: Leonard Zissu, your Honor. I have appeared here before.

The Court: Yes.

Mr. Zissu: There may be some confusion with reference to your Honor's conception of the function of Judge Mc-Geehan and Senator Ives and the proposed order of their appointment.

The proposed order relates their function purely to the technical aspects of the survey. In your Honor's colloquy with Mr. Horsky here, it seemed to me your Honor was talking about the experience and breadth of knowledge and recommendations that these men might make from the operation of the new plan, and your Honor was talking of something far broader than the mere technical survey.

The Court: Well, the order reads that they are appointed to examine periodically the design and conduct of the survey, that is, the basis of the distribution, and to make estimates of the accuracy of the samples, which is also the

basis of the plan of distribution.

Mr. Zissu: Not necessarily, your Honor. The plan of dis-[fol. 885] tribution may take into account your whole system of weighting formulas, which is not the survey problem at all.

The Court: Well, the weighting formulas are based in great measure on both the system that has been set up and the samples which are to be taken. This whole amended decree is predicated upon the results of the survey which was made. Now we want to see whether or not this survey works out fairly and justly, and whether or not it fufills the purpose it was intended to fulfill, and that is the way I interpret this order. We might change it, change a word there and change a word here, and it would be a matter of verbiage.

Mr. Zissu: Well, it frankly is.

The Court: And these utterances which I make contemperaneously with the signing of this order are in the nature of what we judges sometimes refer to as contemporaneous writings, and they will be used to interpret and to apply the order in the scope of the duties and responsibilities of these men.

Mr. Zissu: Well, your Honor, because this may be very, very important to many parties concerned, it would seem to me from your Honor's conception that Judge McGeehan [fol. 886] and Senator Ives would be concerned with the distribution and weighting functions, too.

The Court: They will be, and that is what I intended to

so provide by this order.

Mr. Zissu: Thank you.

The Court: They are going to give me a report on how this is working out.

Mr. Zissu: Thank you, sir.

STATEMENT BY MR. EASTMAN

Mr. Eastman: Your Honor, my name is Lee Eastman, I represent the Current Writers Committee.

The Court: Are you an attorney, Mr. Eastman?

Mr. Eastman: I beg your pardon? The Court: Are you an attorney?

Mr. Eastman: Yes.

The Court: Excuse me. I simply want it on the record.

Mr. Eastman: I appeared before, your Honor.

The Court: I know you have.

Mr. Eastman: I hadn't intended to comment at all today but I do want to reply to remarks of Mr. Dean, when he stated that the Department and ASCAP negotiated to try and help the younger writer.

I represent the Current Writers Committee who, I be-[fol. 887] lieve, have set forth in affidavit form increased evidence or statements of my own, in any event, that they represent at least 50 percent of the current activity in the nature of hits of ASCAP at the present time.

The writers prefer to go back to the old decree, your Honor; have protested greatly the present decree, and I would like to make it clear on the record that they vigorously oppose this present proposed amendment, and very nuch prefer as a lesser evil to go back to the old decree.

The suggestion of Mr. Dean that ASCAP aided the young writer is not reflected by the activities and the views of my clients, who are the active young writers of ASCAP.

The Court: Last evening I had an opportunity to make a few notes and I will now dictate my views upon the record, and it is my decision and factual findings in this matter.

I will appreciate it, Mr. Finkelstein, if you will order a copy of these remarks, which I now will dictate upon the record, so I may sign them as being my findings, and in the nature of an opinion.

[fol. 895] Anybody who wants to take an exception to the ruling may do so, although I don't think it is necessary.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Dean: I don't wish to take any exception, your Honor. Might I just respectfully call your Honor's attention to the fact that since there aren't any fact issues in a consent decree proceeding, I assume that this will be entitled "Opinion" rather than "Findings."

[fol. 896] The Court: Well, it is a finding expressing an opinion on which there was no disputed fact. I find no factual dispute here. I simply have stated my findings to be simply the findings of what I read in the proposed decree.

Mr. Dean: Thank you, your Honor.

The Court: It is not a finding, in that it is intended in any way to be a factual finding of any disputed issues. There has been no trial here, there has been no testimony taken. I simply have set it forth, describing it as a finding, as being a statement of my reading of the decree.

Mr. Dean: Yes, sir. I just want to say one thing further,

your Honor.

Of course your Honor understands that there has been no admissions here of the allegations in the complaint here by ASCAP, and that we do not subscribe to the Government's contention with respect to the propriety of the old procedures.

The Court: I understand that.

Mr. Dean: Yes.

The Court: This is not a decree that has been entered after contest; it is a consent decree within the meaning and the provision of the antitrust laws. There has been [fol. 897] no testimony, and, as is usual, there have been no factual findings as such.

Mr. Dean: I would like to thank your Honor for your patience. I would also like to thank Mr. O'Donnell and Mr. Bennett of the New York office of the Department of Justice for their cooperation. They have taken an enormous amount of time and overtime in this matter.

The Court: Well, I want to thank everybody, including the attorneys who appeared here as friends of the Court, and particularly I want to commend Jerome Golinko &

Company for again having carried out a trust which I have imposed. You have done so.

I have signed the three orders, and I will sign the decree.

[fol. 898]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 13-95

UNITED STATES OF AMERICA,

Plaintiff.

-against-

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,

Defendants.

Court's Exhibit "A"

STATE OF NEW YORK)

:88. :

COUNTY OF NEW YORK)

AFFIDAVIT OF HERMAN FINKELSTEIN

HERMAN FINKELSTEIN, being duly sworn, deposes and says:

1. I am General Attorney for the American Society of Composers, Authors and Publishers (hereinafter referred to as "ASCAP"). Pursuant to the instructions of this Court in the proceedings herein on October 20, 1959 (pages 353-354 of minutes of those proceedings) and in accordance with the provisions of Annex A to the Court's Order dated November 27, 1959, I set up the procedure for, and supervised the preparation of and mailing of a ballot to each of ASCAP's members eligible to vote, upon which each of said members could indicate approval or disapproval of the proposed Consent Order further amending the Amended Final Judgment entered by this Court on March

- 14, 1950, and of the proposed amendments to ASCAP's Articles of Association.
- 2. The preparation of the ballots was conducted in complete accordance with the procedures set forth in Annex A to the order of this Court dated November 27, 1959.

[fol. 899] 3. The eligibility of members to vote and the number of votes assigned to members were determined as follows:

A. Writers

- (1) All writer members, both participating and non-participating, who had executed their membership, radio and television agreements as of the close of business on November 24, 1959 were eligible to vote, except to the extent modified by paragraph (2) below.
- (2) Successors of Deceased Composers and Authors:

In accordance with Article XX of ASCAP's Articles of Association, only those successors to the membership of deceased composers and authors who are related to the deceased member in the eapacity of widow, widower, child, children, brother(s) or sister(s) were eligible to vote.

- (3) The number of votes accorded to each writer member eligible to vote was determined in accordance with the following formula, which is set forth in Article IV, Section 4(h) of ASCAP's Articles of Association:
 - One (1) vote for each \$20 or major fraction thereof received during the previous calendar year as participation in the Society's distributions of domestic royalties excluding all sums received as prize awards, each writer member eligible to vote being entitled to not less than one vote.

[fol. 900] B. Publishers:

- (1) All publisher members who had executed their membership, radio and television agreements as of the close of business on November 24, 1959 were religible to vote.
- (2) The number of votes accorded to each publisher member eligible to vote was determined in accordance with the following formula, which is set forth in Article IV, Section 4(h) of ASCAP's Articles of Association:
 - One (1) vote for each \$500 or major portion thereof received during the previous calendar year as participation in the Society's distributions of domestic royaldes, each publisher member eligible to vote being entitled to no less than one vote.
- 4: At my direction, two voting lists were prepared—one for writer members and one for publisher members—setting forth thereon all members eligible to vote on the above-described basis. I then turned over such lists to Aaron A. Mappen, a senior member of the firm of Jerome I. Golinko & Company.
- 5. In accordance with my instructions, the envelopes in which the ballots were to be forwarded were addressed to the last known address of each member as of the close of the November 27, 1959 business day.
- [fol. 901] 6. I instructed I obert Turner and Eric Leisen, who are employees of ASCAP, to insert the following material, and no other documents or material, in envelopes that were addressed to all ASCAP members eligible to vote:
 - (a) the proposed Consent Order (a copy of which is annexed hereto as Exhibit "A");
 - (b) the proposed amendments to the Articles of Association (a copy of which annexed hereto as Exhibit "B");

- (c) a letter dated November 29, 1959, signed by Stanley Adams, President of ASCAP (a copy of which is annexed hereto as Exhibit "C");
- (d) a ballot upon which the ballot number was stamped and upon which was written the member's number of votes as determined in accordance with the formula and procedure set forth above (copies of the form of ballot sent to the publisher and writer members are annexed hereto as Exhibits "D" and "E"; and
- (e) a pre-paid stamped envelope, special delivery, first class, with the member's ballot number stamped on it, addressed to:

Herman Finkelstein, General Attorney
American Society of Composers, Authors and
Publishers
P. O. Pare 2579

P. O. Box 2578

Grand Central Station, New York 17, New York (a form of which is annexed hereto as Exhibit "F").

[fol. 902] 7. Pursuant to my instructions, after the ballots and other material had been inserted in the appropriate envelopes, as described in the affidavit of Robert Turner dated December 15, 1959, annexed hereto, they were turned over to Mr. Mappen.

8. The mailing of the ballots were directly supervised by Mr. Mappen as described in his affidavit dated December 15, 1959, annexed hereto.

/s/ HERMAN FINKELSTEIN

Sworn to before me this 15th day of December, 1959.

Henry Hofschuster

Notary Public, State of New York
No. 03-6934300

Qualified in Bronx County

Certificate filed in New York County

Commission Expires March 30, 1960

CLERK'S NOTE

In order to avoid duplication of printing, it would be satisfactory if, instead of printing Exhibits A and B in their entirety:

(a) The cover page of Exhibit A to the Affidavit of Herman Finkelstein were printed preceded by the following statement:

"This booklet comprises the proposed consent further amended Final Judgment, together with Attachments A, B and C and the Writers' Distribution Formula and Weighting Formula referred to therein. These documents, as amended by the Consent and Order entered January 7, 1960 (which is printed elsewhere in this Record), are substantially identical to the Consent Further Amended Final Judgment entered January 7, 1960, which is printed elsewhere in this Record."

(b) The following statement is printed in lieu of printing Exhibit B:

"Exhibit B, a booklet To All Members of the Society dated November 4, 1959, containing the proposed amendments to the Society's Articles of Association, is printed elsewhere in this Record."

[fol. 904]

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

575 Madison Avenue New York 22, New York

November 29, 1959

This booklet contains:

1. The proposed Consent Order, consented to by the Government and by the Society, further amending the Amended Final Judgment entered on March 14, 1950. in United States of America v. American Society of Composers, Authors and Publishers (the existing Con-

HOTEL TATT

URGENT NOTICE

DEAR FELLOW ASCAP MEMBER:

Save this letter for at least \$0 days! It is the key to your future welfare.

I have never made a plea like this before, but within the next month ASCAP is going to ask you to vote for or AGAINST the proposed Consent Decree.

The importance of this has so much to do with the security of most members that I must urge you to review the contents of this Decree. It will adversely affect and shorten your security and that of your wife, children, widow or heirs. This was admitted to Judge Ryan in court by the very lawyers responsible for the new Decree.

Because this decree will take away the future security you have planned and contracted for in our fine organization, I implore you to exercise your right by joining me and thousands of your fellow members and vote AGAINST

AGAINST

AGARMT

the proposed Consent Decree.

Sincerely,

VINCENT LOPEZ

P.S. After your careful deliberation please fill in the enclosed card and return at the earliest moment.

sent Decree). The proposed amendments to the Consent Judgment include Attachments A, B, and C.

- 2. The proposed Writers' Distribution Formula.
- 3. The proposed Weighting Formula.

The proposed Writers' Distribution Formula and the proposed Weighting Formula are not part of the proposed amendments to the Consent Judgment. These documents represent the formulas which the Society would initially put into effect, and the Government has agreed that these formulas initially comply with the provisions of the proposed amendments to the Consent Judgment. They may not be amended without thirty days' prior written notice to the Department of Justice and, of course, any amendments would also have to comply with the provisions of the proposed amendments to the Consent Judgment.

When the proposed amendments to the Consent Judgment were drafted, it was hoped that they could be made effective on or about October 1, 1959. Accordingly, there are several references in the proposed amendments to the Consent Judgment, in the Attachments thereto, and in the Writers' Distribution Formula and the Weighting Formula, to the dates September 30, 1959 or October 1, 1959, as the

time when various provisions would go into effect.

At the hearings before Chief Judge Ryan on October 19-20, 1959, he was advised that, in view of the passage of time, counsel for the Society and for the Department of Justice have agreed that they would jointly review all of the dates set forth in the attached documents, and that ASCAP and the Department would then join in asking the Court to substitute, where appropriate, new starting dates—which would be as early as possible under the circumstances—for those appearing in the attached documents.

[fol. 905]

Ехнівіт "С"

MUrray Hill 8-8800 Cable Address: ASCAP, New York

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

575 Madison Avenue New York 22, New York

November 29, 1959

To All Members:

VOTE!

Subject: Proposed Amendments to Consent Judgment; Proposed Amendments to Articles of Association

Enclosed is a ballot to vote on the proposed Consent Order further amending the Amended Final Judgment entered on March 14, 1950, in *United States of America* v. American Society of Composers, Authors and Publishers (the existing Consent Decree) and the proposed Amendments to the Society's Articles of Association which the Society must adopt before it can finally consent to said proposed Amendments to the Consent Judgment.

A vote in the box on the ballot designated "YES" will be a vote in favor of approving the proposed Amendments to the Consent Judgment, and consequently a vote to adopt the proposed Amendments to the Society's Articles of Association.

A vote in the box on the ballot designated "NO" will be a vote against approving the proposed Amendments to the Consent Judgment, and consequently a vote against adoption of the proposed Amendments to the Society's Articles of Association.

All votes will be tabulated according to the Society's present Articles of Association, pursuant to which each member has the number of votes appearing on his ballot.

For the information of Chief Judge Sylvester J. Ryan of the United States District Court for the Southern District of New York as to the number of members voting for and against the proposed Amendments to the Consent Judgment, the votes will also be tabulated on a numerical basis. However, for purposes of determining whether the proposed Amendments to the Articles of Association have been adopted in accordance with the provisions of the Articles of Association, only the weighted vote will be considered.

The Board of Directors has unanimously recommended approval of the proposed Amendments to the Consent Judgment.

[fol. 905a] The resolution for the proposed Amendments to the Articles of Association was duly presented to the Board of Directors at its meeting on November 2, 1959 and was also brought before a Special Meeting of the Society on November 24, 1959, tegether with the proposed Amendments to the Consent Judgment.

It is important that every member vote on the proposed Amendments to the Consent Judgment and on the proposed Amendments to the Articles of Association.

The Articles of Association require that, for an amendment to be adopted, an affirmative vote (weighted in accordance with the Articles of Association) is required of two-thirds of the combined average of writer and publisher votes eligible to be cast.

Please return your ballot in the enclosed postage-prepaid envelope in time to be received not later than midnight, December 19, 1959, or the ballot may be delivered in person or by messenger before such closing hour to 575 Madison Avenue, New York, N. Y., addressed to the attention of Herman Finkelstein, Esq., General Attorney for the Society, who has been designated by the Court to receive these ballots.

Any ballot that is not signed, or is not delivered before the time indicated, cannot be counted.

The following documents are also enclosed:

- 1. The proposed Amendments to the Consent Judgment to be voted upon. This is prefaced by a brief explanatory statement.
- 2. An additional copy of the letter of November 4. 1959 containing the proposed Amendments to the Articles of Association. This is also prefaced by a brief-explanatory statement.

Please read fleese documents carefully, and then be sure to sign your ballot and mail in your vote.

The privilege of voting carries with it the obligation to cast your ballot. Please do so without fail.

Sincerely yours,

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

STANLEY ADAMS,
President.

[fol. 906]

Ехнівіт "D"

BE SURE

TO SIGN THIS SLIP ON THE OTHER SIDE

DO NOT DETACH

BALLOT

VOTES

NAME OF FILE:

SIGNATURE OF REPRESENTATIVE:

Do not detach or fold down stub

This Ballot must be signed above.

OFFICIAL BALLOT

Emblem)

OF

(Emblem)

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

N THE PROPOSED CONSENT ORDER further amending the 1950 ASCAP Consent Decree and Judgment, and N THE PROPOSED AMENDMENTS to the Articles of ssociation.

I vote:

YES □

Mark an "X" in the appropriate box.

A vote "YES" is a vote in favor of approving the proposed amendments to the Consent Judgment. It is also a vote to adopt the Amendments to the Articles of Association.

A vote "NO" is a vote against approving the proposed amendments to the Consent Judgment. It is also a vote against adoption of the Amendments to the Articles of Association.

INSTRUCTIONS FOR VOTING

Be sure to sign the ballot on the above detachable stub. UNSIGNED BALLOTS WILL NOT BE COUNTED. Do not detach or fold down stub. Mail only in the attached. postage-prepaid envelope or deliver in person to 575 Madison Avenue, New York, N. Y., addressed to the attention of Herman Finkelstein, Esq., General Attorney for the Society. All ballots must be received by midnight on December 19, 1959.

[Reverse side]

OFFICIAL BALLOT
MUST BE RECEIVED
BEFORE MIDNIGHT
DECEMBER 19, 1959

[fol. 907]

EXHIBIT "E"

BESURE

TO SIGN THIS SLIP ON THE OTHER SIDE

DO NOT DETACH

VOTES

SIGNATURE OF MEMBER:

Do not detach or fold down stub

This Ballot must be signed above.

OFFICIAL BALLOT

(Emblem)

OF

(Emblem)

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

ON THE PROPOSED CONSENT ORDER further amending the 1950 ASCAP Consent Decree and Judgment, and ON THE PROPOSED AMENDMENTS to the Articles of Association,

I vote:

YES □

Mark an "X" in the appropriate box.

A vote "YES" is a vote in favor of approving the proposed amendments to the Consent Judgment. It is also a vote to adopt the Amendments to the Articles of Association.

A vote "NO" is a vote against approving the proposed amendments to the Consent Judgment. It is also a vote against adoption of the Amendments to the Articles of Association.

INSTRUCTIONS FOR VOTING

Be sure to sign the ballot on the above detachable stub. UNSIGNED BALLOTS WILL NOT BE COUNTED. Do not detach or fold down stub. Mail only in the attached, postage-prepaid envelope or deliver in person to 575 Madison Avenue, New York, N. Y., addressed to the attention of Herman Finkelstein, Esq., General Attorney for the Society. All ballots must be received by midnight on December 19, 1959.

[Reverse side]

OFFICIAL BALLOT MUST BE RECEIVED BEFORE MIDNIGHT DECEMBER 19, 1959 [fol..917]

Court's Exhibit "D"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 13-95

UNITED STATES OF AMERICA, Plaintiff,
-against-

AMERICAN SOCIETY OF COMPOSERS, AUTHORS
AND PUBLISHERS, et al., Defendants.

State of New York, County of New York, ss.:

AFFIDAVIT OF HERMAN FINKELSTEIN

HERMAN FINKELSTEIN, being duly sworn, deposes and says:

- 1. I am General Attorney for the American Society of Composers, Authors and Publishers (hereinafter referred to as the "Society"). This affidavit is made pursuant to the instructions of this Court at the hearing held herein on October 20, 1959 (pages 355-361 of the minutes of those proceedings), and covers my supervision of mailing of certain letters on behalf of members of the Society. There are annexed hereto affidavits of mailing dated January 5, 1960 by Anne G. Feldman, an attorney in the Society's Legal Department, and by Robert Turner and Arnold Saemann, who are employed in the Society's mail room.
- 2. Requests to the Society to mail letters to the entire membership commenting on the proposed Consent Order further amending the Amended Final Judgment of March 14, 1950, were made by or on behalf of the following members of the Society:
 - (1) Barney Young, on behalf of Vincent Lopez, requested the mailing of certain documents, copies of which are annexed hereto as Exhibits "A-1" and "A-2";

[fol. 918] (2) Herbert Cheyette, Esq., who purported to speak

- (a) For himself and Charles Horsky, Esq., as attorneys for Sam Fox Publishing Company, Inc., Movietone Music Corp., Pleasant Music Publishing Corp., Jefferson Music Co., Inc.;
- (b) For Arthur Fishbein, Esq., as attorney for Charles K. Harris Music Publishing Co., Inc., Southern Music Publishing Co., Inc., LaSalle Music Publishers, Inc., RFD Music Publishing Co., Inc., Panther Music Corporation;
- (c) For Sidney Rothstein, Esq., as attorney for Gem Music Corporation, Denton & Haskins Corporation, Barney Young;
- (d) For Bernard Kaufman, Esq., as attorney for Lewis Bellin;
- (e) For Lee V. Eastman, Esq., as attorney for 58 writer members whose names are annexed hereto as Exhibit "B", and
- (f) For the following members who had appeared in the proceedings herein on October 19 and 20, 1959 in their own behalf:

Edgar Battle, Perry Bradford, Robert Davis, Guy Freedman;

requested the mailing of certain documents, copies of which are annexed hereto as Exhibits "C-1" and "C-2".

(3) The members listed in Exhibit "B", annexed hereto, who were represented by Mr. Eastman, requested an additional mailing of certain documents, copies of which are annexed hereto as Exhibits "D-1" and "D-2":

- (4) Hans J. Lengsfelder requested a mailing of certain documents, copies of which are annexed hereto as Exhibits "E-1", "E-2", and "E-3".
- (5) The Sam Fox Publishing Company, Inc., requested an additional mailing of a certain document, a copy of which is annexed hereto as Exhibit "F".
- [fol. 919] (6) Abel Baer, speaking for himself and 43 other members whose names are annexed hereto as Exhibit "G", requested the mailing of a certain document, a copy of which is annexed hereto as Exhibit "H".
- (7) Otto A. Harbach requested the mailing of a certain document, a copy of which is annexed hereto as Exhibit "I".
- (8) May Singhi Breen De Rose requested the mailing of a certain document, a copy of which is annexed hereto as Exhibit "J".
- 3. I, or in my absence, attorneys in the Society's Legal Department acting in accordance with my instructions, advised the persons above described that the material annexed hereto as Exhibits "A-1", "A-2", "C-1" through "F", and "H" through "J", would be mailed by the Society on their behalf and that such persons would be permitted to have representatives present at the Society's offices while the addressing, inserting and mailing of such material took place. The affidavits of Anne G. Feldman, Robert Turner and Arnold Saemann, annexed hereto; set forth the names of the persons who were present at such mailings as representatives of the persons above described.
- 4. Pursuant to the instructions of Stanley Adams, President of the Society, certain documents, copies of which are annexed hereto as Exhibits "K", "L" and "M", were mailed to all members of the Society and certain documents, copies of which are annexed hereto as Exhibit "N-1" and "N-2", were mailed to all writer members of the Society.
- 5. On December 11, 1959, I directed that the document annexed hereto as Exhibit "O" be mailed to all members whose ballots had not yet been received. I asked Aaron

A. Mappen of the firm of Jerome I. Golinko & Co., whose [fol. 920] affidavit dated January 5, 1960, is annexed hereto, to show Robert Turner, and no other person employed by or connected with the Society, a list of the members whose ballots had not been received.

6. It was agreed during the hearings herein on October 20, 1959 (minutes, pages 358-360) that the Society would pay \$1,000 toward the expenses of a single mailing to the members of the Society by all those who appeared, in person or by counsel, in opposition to the entry of the proposed Consent Order. Such a mailing was made. (Exhibits "C-1" and "C-2" hereto). The Society paid \$279.44 for postage for this mailing. Pursuant to the direction of Herbert Chevette, Esq., the remaining \$720.56 of said \$1,000 was paid by the Society by a check to Sidney Rothstein, Esq. A copy of the letter accompanying that check is annexed hereto as Exhibit "P".

Herman Finkelstein

Sworn to before me this 5th day of January, 1960.

HENRY HOFSCHUSTER Notary Public

HENRY HOFSCHUSTER
Notary Public, State of New York
No. 03-6934300
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1960

Members for a Fair ASCAP

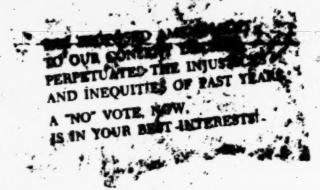
Representing a majority of the groups that appeared is fore judge Rijas, on October 19th, in addition to those many writers and publishers, great and visuall, who have taken heart and pointed as since then

DEAR FELLOW, MEMBER OF ASCAP:

Vote NO on the proposed amendment!

Who dreamed up the proposed amendment? You were never consulted about it. It does not represent your needs. Only the ruling group will profit by having it passed to because it will keep them in control by continuing to deny you and the majority of members a proper voice in ASCAP!

No wonder Judge Ryan, who must pass on the amendment, said he saw no consent in this Consent Decree Therefore total NO NO CONSENT.



THIS IS THE FIRST TIME YOUR VOTE REALLY COUNTS ... VOTE NO!

Vote NO , this time you cannot be crushed by weighted votes! Judge Ryan has arranged for votes to be tallied on a "one enember ... one vote" basis, as well! ASCAP, in order to survive, must (in the words of Judge Ryan) "clean its own house." Therefore vete NO and get the "clean-up" started!

HERE'S WHAT A "NO" VOTE CAN DO!

- Find the control of ASCAP by a power-hungry, self-perpetuating few!
- 1 Force a simple, fair distribution of ASCAP "performance rights" earnings!
- , Stop favoritism that arbitrarily "ups" and "downs" songs
- Eliminate the penalty against the current songs'

A "NO" VOTE MEANS THE BEGINNING OF A BETTER ASCAP . . . NOT THE END OF ASCAP!

A "NO" vote will not cause the dissolution of ASCAP! The administration would not have tried to force through the same old injustices if they had the slightest fear of dissolution. (They would not have dared to jeopardize their yearly millions... they have the most to lose!).

DON'T FAEL FOR THE BLUFF OF THREATENED BESIGNATIONS

- ★ Wagner Bros left in 1935 and had to come back in 1939
- ★ ht 1941, the networks and BMI combined could not keep ASCAP off the an
- The public demands ASCAP music, and the government will see that they get it
- * Who should assome nant to resign from a clean 18t Ale All as exent is four treatment for according from the biggest to the smallest.

R COMMITTEE OF

Members for a Fair ASCAP

0,00,00,00,00,00,00,00

Want the facts-

that ASCAP's ruling officials haven't given to you?

Look at what Judge Ryan Congress, and the Justice Dept. have to say ---

فكول والالعدا والعواد المامود الماموداء الدادا

00000000000000000

Here are some of the Official Statements:

JUDGE RYAN, COMMENTING ON THE HEARING, SAID TO ARTHUR DEAN ASCAP COUNSEL

> I have been impressed by them. . They have shown weaknesses in your organization, they have shown some weaknesses in the administration

ROOSEVELL COMMITTEE STAFF ANALYSIS OF THE AMENDMENT -

It is eventual, however, that the powers of the 'ruling clique,' be

With reference to the proposed amendment to the distribution formulas

> It appears doubtful that it will bring the necessary degree of help.

With reference to the grievance procedures

It is in this area, particularly, that the ruling elique within ASCAP appears to have demonstrated a feeling of indifference toward the welfare of the smaller publisher and composer members

. In any event it is necessary that the ruling officials of the Society be made to realize that they are the servants of the members not their musters

CONGRESSMAN PHILIP PHILBIN (MASS)

I am very triendly disposed toward the great music industry I/am eager to see it prosper and grow in every legitimate way But in view of many evidences of gross abuses, flagrant influstices, ruthless methods and monopolistic patterns. I am again arging its leadership to clean house and banish those unjust practices of its own motion before the Congress is constrained to apply drastic remedies that may occasion more or less rigid-control of activities that are violative of good conscience and equity, and contrary to public interest

JUSTICE DEPARTMENT'S MEMORANDUM -

ASCAP's local survey is p accurate and inethicient

Retering to background music credits

· Such rules put certain members of the Society at a tremendous competitive disadvantage."

The Board has complete control of the affairs of the Society self-perpetuating

Regaring to the weighted vote

It is impossible that true representation can be given on the Board of Directors to members with different participation in the ASCAP revenues.

Reterring to the rules of distribution

The vice of the system is that it gives those members in ASCAP who receive the largest share of ASCAP's revenues the power to elect the direcfors of the Society, who, in turn, have the power to establish the rules governing the Society's system of distribution. which, in turn, determines which members shall receive the largest share of the Society's income

The members have nothing to say about the enactment or promulgation

thus, it is apparent that ASCAP's appellate machinery has been made so complex, gumbersome, dilatory and expensive as to effectively deny its members the right of appeal to an im-'partial board."

EMPOSERS

YOUR COMMITTEE

Members for a Fair ASCAP

Vote NO!

against the proposed amendment

∜o the consent decree, and -

PROTECT YOUR FUTURE IN ASCAP!

Here's the real story

N A SHORT TIME, YOU WILL BE ASKED TO VOTE ON A NEW ASCAP CONSENT DECREE...

question is ...

IS IT YOUR DECREE? • DID YOU CONSENT?
WERE YOU THERE AT THE NEGOTIATIONS?
WERE YOUR NEEDS CONSIDERED?
WERE YOUR INTERESTS REPRESENTED?

F YOU, ARE NOT A MEMBER OF THE BOARD OR ONE OF THE FEW FAVORED INS," the answer to all the questions hay to be NO!

t vote of "NO" to the new consent decree will the first step toward guaranteeing a fair hare for all members!

Let us consider what caused the present critical attuation in ASCAP. Certain groups of members, both publishers and writers, went to Congress and he Justice Department for redress of what they lift were wrongs done them by the rulings of the ASCAP Board. They all had one thing in common They knew from experience that the Board would do nothing for them. THEY WENT BECAUSE THEY KNEW THEY HAD NO OTHER CHOICE! The action of the ROOSINITI SMAN BUSINESS COMMITTEE and the JUSTICE DEPARIMENT proved that there was justice in their claims the order came down to ASCAP. CLEAN HOLES.

WHAT WAS THE BOARD'S REACTION? Did they sit down in a spirit of give and take to ron out differences? NO. They girded their foins for battle, hired top grade legal counsel for enormous sums of YOUR money and set out to keep heir position of entrenched power intact. Did these new lawyers spend fore minutes with the different groups to find out where justice really say they did not. They were not hired for this curpose. They were hired to preserve the powers of the entrenched few; to yield, if necessary, some reluctantly with one hand and grab even more with the other. Indeed, these new lawyers were vitalled from the complaints of the membership they were hired to serve.

Now, what was the plan of battle of the en-

- VIO HAMMER OUT THE BEST DECREE THEY
 COULD GET LOR THEMSELVES FROM THE
 JUSTICE DEPARTMENT.
- 2 TO GET APPROVAL FROM JUDGE RYAN
- Then, and only then, GO TO THE MEMBERSHIP WITH AN ALREADY APPROVED DECREE

They were going to let you vota after the decision was made!!!

BUT Judge Ryan did not see it that way. Judge Ryan said, and these are his words.

1 SEF NÓ CONSENT AN THIS CONSENT DECREE."

So the Judge ordered the Decree submitted to the membership now, not later He wanted toknow the true will of the Society.

Members of ASCAP, Judge Ryan has given us a life. We cannot afford to toss it away.

What we want is what should have happened in the first-place, a consent decree which will contain equity for all

We want an end to the constant strife which has torn at the guts of the Society for so long. There is only one way to end this strife, and that is to end the injustices imposed upon us by a willful few!

In order to get your vote the Board will threaten you with many bogeymen. Why? Who will penalize us because we want a hand in the formation of the Consent Decree of our own Society? Isn't this what the Justice Department wanted in the first place? No one can be harmed by a fair decree.

Join us and get a Decree in which YOUR interests will be fairly represented

VOTE NO TO THE PROPOSED AMENDMENT!

The real strength of the entrenched minority has always been their ability to divide the membership. Don't let this happen again. This is your first real chance to make your vote count.

VOTE NO TO THE PROPOSED AMENDMENT!

Don't be frightened! We cannot be harmed if we actitately and honestly. VOLE NO TO THE NEW PROPOSED AMENDATINE AND YOU WILL BE, OTTING YES TO A NEW ERA IN ASCAP

We take no joy in the struggle which is now raging in the society. We do not wash any victories, only peace and understanding. We ask the Board to give up the arrogance and contempt with which they have treated the bulk of the membership.

With utter sincerify we urge all groups to sit down in a spirit of compromise and good will. You will find in us no intransigence, no ill will, only a desire to live and let live Indeed, we must learn to live with each other in a spirit of harmony for ASCAP to flourish and grow.

Vote NO! ASCAP's future de

Vote NO!

...and INCREASE YOUR EARNINGS!

Vote NO!

and PUT ASCAP back in the music

Vote NO!

...and PROTECT the provisions of YOU

Vote NO!

and PREVENT ASCAP from being d

Vote NO!

IN YOUR OWN INTERESTS for a democrathe majority & <u>Vote NO</u> against the

D's future depends on You!

R EARNINGS!

k in the music business!

ovisions of **YOUR** security rights!

P from being dissolved!

of ASCAP by a self-perpetuating few!

NO against the new amendment!

[fol: 926]

Ехнівіт D-1

"THERE WILL ALWAYS BE AN ASCAP"

November 19, 1959

Dear Fellow members of ASCAP,

"It is not the intent or to the best interest of the U.S. Government" to dissolve ASCAP." DON'T BE LED ASTRAY!!

You will soon receive a ballot from ASCAP. If you vote "YES" to these Articles of Association, you are voting to APPROVE the proposed consent decree. If you vote "NO", you are voting to DEFEAT the decree.

VOTE NO!

A VOTE AGAINST THE DECREE DOES NOT CONSTITUTE A THREAT TO THE SOCIETY!!!

WHO SAYS SO!

CONGRESSMAN JAMES ROOSEVELT IN THE ENCLOSED ARTICLE!!! READ IT NOW!!!

In the new distribution plan in the consent decree there is a GIMMICK called RECOGNIZED WORKS. THIS WILL ROB YOU OF 30% OF YOUR CURRENT ASCAP INCOME. CAN YOU AFFORD IT!

A \$5,000 income will be cut to \$3,500

A \$3,000 income will be cut to \$2,100

A \$2,000 income will be cut to \$1,400

A \$1,000 income will be cut to \$700 ... et cetera.

WHAT A PICNIC THIS WOULD BE FOR B.M.I.!

ASCAP is a GIANT! The great old songs are its MUSCLE. The new songs are its FOOD.

B.M.I. is a GIANT. New songs are <u>ITS</u> MUSCLE and ITS FOOD.

STARVE AND DISCOURAGE THE NEW AND ACTIVE WRITER OF ASCAP AND YOU FEED THE B.M.I. GIANT!!

A CUT OF 30% IN HIS CURRENT INCOME KILLS THE ACTIVE AND NEW WRITER.

KILL THE ACTIVE WRITER AND YOU KILL ASCAP!

Common sense tells you ASCAP must think of TO-MORROW as well as TODAY. Vote against the articles of as ciation! Remember, they look innocent in themselves, but if you accept them, you accept the LOADED consent decree.

ASCAP and YOUR FAMILY'S SECURITY.

Sincerely yours,

THE CURRENT WRITERS COMMITTEE

- ★ Warner Bros left in 1935 and had to , ome back in 1936
- ★ In 1941, the networks and BMI combined could not keep ASCAP of the air
- * The public demands ASCAP music, and the government will see that they get it.
- * Why should anyone u ant to resign from a clean.

 ASCAF? All we want is fair treatment for a congone, around the biggest to the smallest.

A "NO" vote will accomplish the Boosevelt Committee's objective: "that the ruling officials of the Society be made to realize that they are the servant, of the members, not their masters."

Vote NO AND WIN THE RIGHTS TO A PROPER VOICE IN A TRULY DEMOCRATIC ASCAP!
ASCAP'S FUTURE DEPENDS ON YOU!

[fol. 928]

Ехнівіт "Е-1"

H. J. LENGSFELDER 27 Montrose Rd. Scarsdale, N. Y.

Dear Fellow Member:

Having read the recent pamphlet from ASCAP, let us discuss the important facts in the battle now raging within the Society.

TO ALL MEMBERS of whatever persuasion, this plea is addressed in the strongest terms:

THE NEW CONSENT DECREE MUST BE DEFEATED!

Those who for obvious reasons try to force its passage, have resorted to the use of FEAR to influence our decision. No where do they say this is a fair and democratic decree. Instead they threaten possible dissolution. This is a false threat, and facts will prove it so.

My convictions come from my many contacts with legislators and government officials. They have unanimously and unqualifiedly stated that the existence of ASCAP is a MUST, but that it is equally a MUST that the Society be run honestly and fairly.

The present ASCAP Board tries to create the false impression that the new Decree is all that the Government wanted. However government lawyers stated in court that the proposed Decree is the most that could be obtained from the Board of ASCAP.

The lawyers hired by the Board fought desperately for this Board to retain its control of the Society. The Decree was negotiated behind our backs and our Board did not even plan to let us vote on the Decree! It was only Judge Ryan's last-minute decision which now gives us this privilege. IF IN THE FUTURE YOU WANT A VOICE IN OUR SOCIETY'S AFFAIRS, YOTE "NO".

The Government investigations have proven that the Society is being run by the few giant publishers on the Board

(An irate and critical writer member of the very same Board called them openly the "Powerhouse"). Said the recent Government memorandum to the U.S. District Court, page 24:

"Less than 1% of the publishers have the voting power to elect all twelve of the publisher directors, and less than 5% of the writer members can elect all the writer members."

Remember if there were the slightest threat of dissolution, the Board would never have acted so arrogantly and dictatorially, thus creating the current struggle. For many years, even during the recent negotiations with the Government, I kept pleading in vail with our Board to call in members with different interests to discuss and iron out the inequities in our system. Copies of these many letters are available to any member. Instead, the Board ignored all pleas and therefore must take the full responsibility for bringing about the present situation.

Now let us cut through the hysteria and panic whipped up by the Board and consider calmly the various possibilities, should the membership vote "NO" to the Decree.

- 1. Judge Ryan might persuade the Board to sit down with all members to work out a better and more democratic decree.
- [fol. 928a] 2. Judge Ryan might refuse to sign the Decree and refer the case back to the Justice Department. Then our Board can either negotiate a new decree with the Justice Department, a new decree acceptable to all members, or defy the membership and our Government, refusing to give up its position of dominance.
- 3. Should the ruling minority in ASCAP refuse all compromise, the Justice Department might be forced to litigate. BUT THIS LITIGATION CAN ONLY CONCERN THE UNFAIR PRACTICES WITHIN THE SOCIETY! Such litigation can prove disastrous for the Board, not for the Society.

We, whose livelihood depends on the welfare of ASCAP must: VOTE NO TO THE NEW CONSENT DECREE.

Then let us all sit down in a spirit of "live and let live" to work out a decree for the good of all.

THE MEMBERSHIP IS ENTITLED TO:

- 1. Voting that will prevent any one group from controlling the lives and destinies of all.
- 2. Unbiased logging which will cost less and not leave most of our earnings up to chance.
- 3. Distribution on the same basis for all, old and new songs alike, with USAGE the only measuring rod for payment.
- 4. Security for writers, but on a fair and unbiased basis. In other words . . . THE SAME SECURITY FOR ALL.
- 5. Simple rules (with no possibility of different interpretations) so that anyone can understand the workings of the Society.

THIS CAN BE DONE!—SOCIETIES ALL OVER THE WORLD HAVE IT!

Then, with a united membership and a clean, respected Society, we can forget our differences and strive for badly-needed improvements OUTSIDE the Society, such as copyright laws, the Juke Box payments, and others.

Now, as to the members who have joined our Society since 1941—do not be afraid to join us in our fight for a better and fairer ASCAP. Remember that if it were not for the determined opposition in ASCAP, you would have no Society to worry about because YOU WOULD NEVER HAVE BEEN ALLOWED IN! It was our fight, with "blood, sweat and tears" which caused our Government to give you the right to become members. Now that you are members, join us in our efforts to make it a fair society for all writers and publishers of yesterday, today, and tomorrow.

Cordially yours,

/s/ Lengsfelder H. J. Lengsfelder

P. S. I would appreciate receiving your ideas about this important matter. Enclosed is a postcard for your convenience.

[fol. 931]

Ехнівіт "F"

- 1.. The publishers need the writers and the writers need the publishers, and we both need a fair and honest ASCAP, Now the Society is run by a small group of major publishers who act as if they need no one but themselves.
- 2. Would we as a big publisher with no BMI affiliate risk bankruptcy by voting NO if we thought there was a chance of ASCAP being dissolved?
- 3. For the first time in the history of ASCAP your ballot is SECRET and your ballot COUNTS. VOTE NO!

SAM FOX PUBLISHING COMPANY, INC.

/s/ FREDERICK FOX

avoteagainst the d'ecree does NOT endanger ASCAP!

THE BILLBOARD

NOVEMBER 16, 1959

[fol. 928]

Ехнівіт "Е-1"

H. J. LENGSFELDER 27 Montrose Rd. Scarsdale, N. Y.

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/s/ LENGSFELDER
H. J. Lengsfelder

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- 3. For the first time in the history of ASCAP your ballot is SECRET and your ballot COUNTS. VOTE NO!

SAM FOX PUBLISHING COMPANY, INC.

/s/ FREDERICK FOX

Dear ASCAP Member:

We are writing you with regard to the coming vote on the recently amended ASCAP Consent Order. We are a group of writers from all classes in ASCAP. We may differ among ourselves about certain details of the Consent Order, but we are all agreed that a "YES" vote is imperative.

The Government has told ASCAP that it must amend certain rules of operation, including the distribution of monies to its members and the method of electing its board of directors.

The proposed changes have been agreed to, after long negotiations, by the Department of Justice and unanimously by the board of directors of ASCAP. According to Judge Sylvester J. Ryan of the Federal District Court, the amended Consent Order embodying these changes must be voted on by the membership before he approves or disapproves it. You can only vote for or against accepting it in its entirety. Judge Ryan has ruled that the Consent Order cannot be altered at this time.

A "YES" VOTE .

DOES NOT MEAN THAT YOU FAVOR EVERY POINT IN THE DECREE

BUT.

DURING THE 18 MONTHS
FOLLOWING THE ACCEPTANCE
OF THE ORDER, ANY CONTROVERSIAL POINT CAN BE REEXAMINED,

AND THEN

WE, AS WELL AS THE DEPT.
OF JUSTICE WILL HAVE A
CLEARER PICTURE OF HOW
ASCAP CAN AND SHOULD WORK.

- MOST IMPORTANT

ASCAP WILL CONTINUE TO . EXIST.

A "YES" VOTE

WILL KEEP ASCAP ALIVE

A "NO" VOTE

WOULD NEITHER CHANGE NOR PRESERVE THE PRESENT SYSTEM

BUT

IT MAY LEAD DIRECTLY
TO A LAWSUIT INSTITUTED
BY THE GOVERNMENT,
ACCORDING TO JUDGE RYAN:

"Such litigation might possibly sound the death knell of ASCAP and other similar associations"

MOREOVER, IT IS POSSIBLE

THAT DURING THE COURSE OF THIS SUIT, LICH COULD LAST FOR YEARS -YOUR INCOME FROM ASCAP MIGHT BE INTERRUPTED OR INTERFERED WITH.

A "NO" VOTE

MAY KILL ASCAP

A failure to vote has the same effect as a negative vote.

By not voting at all you may be serving the enemies from without who would like to see ASCAP destroyed.

Be sure to vote.

Whatever your type of writing or your income, whether you be write or publisher or both, you will be serving your interests and protecting your family by voting "YES".

Your Fellow-Writers,

[fol. 934]

Ехнівіт "І"

OTTO A. HARBACH 239 Central Park West New York 24, N. Y.

November 28, 1959

Dear Fellow Member of ASCAP:

I joined our Society in 1914. Since then I have tried to serve it and you in whatever way I could—as a writer of many songs, as a member of the Board for many years, and at one time as your President. I've seen ASCAP grow from nothing to the Society of which thousands of writer and composer members are proud.

Nathan Burkan, one of our founding fathers, used to say: "This Society will never be destroyed by enemies from without—only by enemies from within."

Today the truth of this prophesy is being tested. Shall ASCAP continue to live, or shall ASCAP as we know it die? This depends on how you and your fellow members vote on the new Consent Decree, now in our hands.

If the Decree fails to win acceptance from our membership, writers and publishers will face the chaotic conditions of half a century ago, fighting for their rights in court. This may not be a bad situation for the strong, who will survive. But the weak—including many younger writers, as well as the widows and children of former members—will, suffer.

A vote for the Decree means the continuance of our beloved Society and a chance in the days to come to smooth out rough places and improve conditions for all.

A vote inspired by your objection to some single clause means a vote against the whole decree. Think twice before voting to turn the clock back. It is as simple and as tragic as that.

Sincerely,

/s/ Отто А. Нагвасн Otto A. Harbach

EXHIBIT "J"

MAY SINGHI BREEN DE ROSE 186 Kiverside Drive New York 24, N.Y.

Dear Fellow Member:

I have before me several letters which I have received in the past week in opposition to the ASCAP Consent Decree Order.

I am sure that the writers of these letters have been misinformed or misguided when they try to frighten members into voting against the proposed Consent Decree Order by saying their security will be jeopardized if they do not do so.

As a member of ASCAP for the past ten years and as the executrix of the estate of my husband Peter DeRose whose membership goes back to 1922, I feel I have a great deal at stake.

I have given this matter very careful consideration and I also feel I am acting as Peter would want me to if he were here. Songwriting was his vocation. He contributed generously to the ASCAP catalog and placed all his faith and loyalty in the organization.

Like Peter, many of our members were active writers from the time they joined ASCAP until they died. Such names as Victor Herbert, Sigmund Romberg, Jerome Kern, George Gershwin and many others too numerous to mention. In their unwritten wills they left the same heritage to you, to me, and to all the world. By this I mean their beautiful songs which have earned for them a permanent niche in the Hall of Fame of American music.

ASCAP is the songwriters "Rock of Gibralter" and I urge everyone to vote "Yes" when you receive the ballot. This will mean that your security and protection will beguided honestly and fairly.

ASCAP must survive and only unity will do it.

Sincerely,

/S/ MAY SINGHI BREEN DEROSE

Ехнівіт "К"

[fol. 936] MURRAY HILL 8-8800

CABLE ADDRESS: ASCAP, NEW YORK

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

575 Madison Avenue Néw York 22, New York

STANLEY ADAMS
President .

November 24, 1959

To All Members Of The Society:

At the recent West Coast meeting on November 11, 1959, which was held to discuss the proposed Consent Order and the proposed Amendments to the Society's Articles of Association, I made a report to the members. In addition, Mr. Arthur H. Dean, special counsel to the Society, addressed the meeting on these subjects.

Because of the importance of these matters, a copy of my report and of Mr. Dean's remarks is being sent herewith to all members of the Society.

Sincerely yours,

STANLEY ADAMS .

President

[fol. 936a]

REPORT OF STANLEY ADAMS, PRESIDENT, AT WEST COAST MEETING, BEVERLY HILTON HOTEL NOVEMBER 11, 1959

When we last met our attorneys had just concluded lengthy discussions with the Department of Justice lawyers, and our Board of Directors had approved the compromise agreement which is known as the proposed Consent Order. We—the officers and Board of Directors of the Society—felt that you were entitled to a full report directly from our eminent special counsel, Arthur Dean. Your close attention to his detailed report was a compliment both to his clarity and your intelligent understanding and appreciation of our problem.

This evening our counsel is here to explain certain matters, the procedures for securing the consent of the membership and implementing the proposed Consent Order, and to answer any questions you may put to him.

Before we open the floor for discussion, I feel that it is my duty to tell you how I view the situation, speaking as one member of the music fraternity to his fellow members. Please bear with me for not more than fifteen minutes, while I exercise the prerogatives of the office of President in leading off this discussion.

As you all know by this time, the proposed Consent Order is a compromise. It does not represent a victory for the Government or for ASCAP—or a defeat for either. It does represent the considered judgment of the Government attorneys that with the changes now being made, the operations of the Society will conform to the requirements of the anti-trust laws; and on the part of the Society and its attorneys, that these changes are reasonable and fair to the members of the Society, taking into consideration the serious and possibly fatal alternatives that might face us if we were to be unyielding.

Some of you may have been led to believe that all the dissident groups are contending that we have been too confol. 936b] servative and have not gone far enough in the direction of, among other things, 100 percent current performances for everyone, or an equal vote for all members.

I attended the hearing before Chief Judge Ryan on October 19th and 20th and noticed that some opponents of the proposed Consent Order were very forceful in their contention that we have been too radical and have gone too far; that we should have preserved more of seniority; that we should not have removed the brakes on a writer's demo-

Adams Letter to ASCAP Voters Draws Roosevelt Ire

Calls Threat of Government Lawsuit 'Attempt to Intimidate'

By MILDRED HALL

Roosevelt has issued a scathing re- against the Society would follow buke of the recent letter sent to which may result in the dissolution ASCAP membership in which its of the Society. president, Stanley Adams, insist-bently points out that a vote against the proposed consent de-strengthed or therwise improvecree negotiated by Justice Depart- the provisions of the decree presment and the Society's attorneys, ently under consideration and it might mean a government suit, would seem to be self-evident that with possible "dissolution" of the their desires are entitled to be con-American Society of Composers, Authors and Publishers (The Billboard, November 9; 1959).

"Any threat of a law suit appears to be an attempt to intimidate," is the grim comment of Roosevelt, whose House Small Business Subcommittee held exhaustive hearings on the ASCAP small-business complaints, in 1958, leading to the renegotiation of the ASCAP consent decree.

Complete Statement

Roosevelt's complete statement

"It has come to my attention that a letter bearing the signature of ASCAP's president has been mailed to members of the Society urging them to vote to accept without change the proposed consent decree filed with the court a few months ago. I am told that this letter, in no uncertain terms, tells the members that if they vote

against the acceptance of this de-WASHINGTON. - Rep. James cree, a law suit by the government

> sidered. I find it quite disturbing therefore; to be informed that the members are being told that they may vote on the proposed decree. but that their freedom of expression is limited to the acceptance of the decree as presently drawn or the acceptance of a law suit that may kill the Society

Attempt to Intimidate

"It seems to me that the only thing that could being about a law suit by the government against the Society would be a refusal of the government and the Society to recognize the will of the majority. If the ASCAP members reject the decree and the court rejects the decree, clearly a mandate has been issued which compels the Society and the government to seek to reopen their negotiations in order to enable themselves to present a more equitable and acceptable decree to the court. Any threat of a taxistiff appears to be an intimidate

I "Our subcommittee held exhau tive hearings last year that served to demonstrate the compelling need for changes in the policies and procedures of the Society in order to permit the smaller writer and publisher members to remain in business. The negotiations which led to the tentaine adoption of the consent dedice originally were intended to remedy those inequitable practices of the Society shown by the hearings to threaten the continued existence of its many small business members. My views respecting and adequacy and acceptability of the consent decree are set forth in an analysis to which reference was made during the course of October, 1959, hearings before the ourt Upon request, copies of this analysis will be supplied by the House Small Business Committee, Washington 25, D. C.

VOTE NO! add 30% oyour current performance income!

tion; that we should not have given anyone an option of 100 percent current performance; that we should not have diluted the voting rights of the large producers.

This Consent Order has charted a course down the middle of the stream to avoid the shoals on one side and the reefs on the other. This is the essence of compromise, and this we did.

We must all start with the premise that we, as a Society, were—and indeed still are—faced with a very serious problem. Call it an ailment, if you will, for organizations are subject to attacks and illnesses just as in the case of the individual human being. We in ASCAP have thus far exhibited the strength, adaptability, power of resistance and resilience of a basically healthy organism. We are now faced with a new test of strength and courage. The challenger has the backing of all the forces of the Government of our country. In a sense, the challenger is also the physician—for it is the duty of the Government to preserve healthy organisms as well as to attack and destroy those that may be harmful to the rest of the community.

The Government has conceded that our Society should be encouraged to survive—that it serves the public interest. It has examined ASCAP from-stem to stern. You know what the attacks have been: first and foremost, that the Society was unduly considerate of its older members—that on the writers' side demotions were too slow, that seniority was too high and that too little consideration was given to [fol. 936c] the value of a current performance. The Department of Justice threw in another one—that the top 100 writers were being compelled by the remaining writers to give up too great a part of their earnings. At the same time, and incongruous as it may seem, it was charged that these same top 100 writers—and the top publishers—had such great voting power that a few of them might band together to favor themselves at the expense of their less productive brothers. A compromise on the subject of voting was reached very quickly. The voting formula now before you was set up to conform to the position taken. by the Government almost at the outset.

In viewing the kind of regulation we may expect or accept, we must try to look at ourselves as others see us, and then try to view our Society as it appears to members other than ourselves.

Our 1950 Consent Decree gave all users an assurance against any possible abuse of our collective power, by giving a Federal Court the full authority to determine the reasonableness of our rates. This can only be done by legislation or by a consent decree. We accepted the latter form of regulation, and we think it has been in the public interest as well as our own.

We still have with us the question of distribution. That will be a thorny problem as long as we license and collect for the use of our works in bulk form. (Of course, if licensing were on any other basis, there would be no need for our Society as we know it.) What values do our users assign to the many performances of certain works that have little lasting quality as compared with the lesser number of performances of other works that are known to and loved by millions of people of all ages? Does the writer or publisher who has been loval to the Society in good times and bad have a claim to present consideration because of his contributions and sacrifices over the years? Bearing in mind our obligation to encourage those who wish to enter our [fol. 936d] craft, what sacrifices can we require from those who are enjoying substantial returns from catalogues which they have built up during decades of devotion to their calling-I refer particularly to the top 100 writers of whom we hear so much, and who in the past have demanded relatively so little on a per performance basis. How can we ever hope to reconcile wholly the views of a member whose works are used mainly in motion pictures as against the views of the popular writer who seldom had a song in a picture? What do all of us owe the writers and publishers of serious and religious music which add so much prestige to our catalogue and help to fulfill our mission as a great contributor to the musical life of our nation?

No two members are apt to agree on this now or at any time in the future. No two members of the Board of Directors have exactly the same views. We must try to reach a fair compromise. If we produce a formula which discriminates unfairly as against one member or group of members, they may secure redress from an outside body selected by the American Arbitration Association. We believe that this will solve our distribution problem, just as the rate-fixing provision of the 1950 amendment of the Consent Decree solved the problem of what is a reasonable price for our catalogue.

I can understand the feelings of many members that they could have worked out something better than did the ASCAP Board of Directors and its counsel. This is not unique to ASCAP and its membership. Every military battle has been re-fought by armchair strategists, who can show a better plan than the generals who had to make the decisions. Regarding these decisions, what I have just outlined are only a few of the problems that confronted us in the administration of the Society, and regarding such administration I will concede that there are no geniuses on the Board of Directors.

I will also contend that there are no geniuses off the Board of Directors.

[fol. 936e] I will admit that, being human, members of the Board make mistakes. I will also assert that those off the Board, being human, make just as many errors.

But I do feel that with long experience and with deep application to the job at hand, the Board of ASCAP collectively can better analyze the needs and requirements of all segments of the Society and can best reconcile all divergent views.

Talking about divergent views, there is a group in the Society who, in all sincerity, have a firm conviction that we should contest any change, resist these proposals, prepare to litigate and take our chances in the court.

To any member, to whom the result would make little or no difference, there is nothing that I can say, but to those who, to varying degrees, depend on their income from the Society, they know that the most sympathetic landlord wants his rent-or mortgage payment; that the insurance company insists upon the payment of premiums; that the corner grocer wants his money.

And so, the spectre of that old triumvirate, of food, clothing and shelter is always before the eyes of the Board of Directors when they are called upon to make decisions of this sort.

Sure, a gambler takes a chance and goes for broke. But he is only taking a chance with his own money.

Believing that we can exist and prosper under the new Consent Order, we have decided that litigation would be wrong. So we will not go for broke. We are not going to take a chance. We will not gamble with your economic lives, with the destiny of your family, or with the security of your children.

For a long time, the Department of Justice talked and we listened—we talked and they listened—we both talked and we both listened. And as they talked we learned—as we [fof 936f] talked they learned. The compromise, as evidenced in the new Consent Order, is the culmination of what we both learned.

Where is it written that the opponents of the Decree are right and that we are wrong?

What unseen power has given them the vision that has been denied to the rest of us?

Who among them is the great chef who has concocted the recipe that will please the taste of us all?

I repeat, all of us, not just them, not just you, not just me, but all of us.

However, if you, in your wisdom, affirm this Consent-Order, I will pledge myself to fight against any standpatism, any willingness for the Society to drift along, any tendency to let the future take care of itself.

Such a course of action will only bring a repetition of what we have just gone through.

To this end, I have two things in mind. When and if the Decree is approved by the members and by Judge Ryan,

with the exception of altering the weighted vote provision, I will ask the Board to examine suggestions of any member or group of members, as soon as possible, and to act upon them, if such action is indicated. Secondly, regarding the writer membership, I intend to appoint a committee from the general membership to act in an advisory capacity to the Writer Board. The West and East, the serious and popular, the big and small catalogues, both as to size and income, and the old and young writers, shall all be represented.

There is no reason why this should not be. I believe that, in addition to its duly elected representatives, members should be encouraged to express their views and be assured that their voice shall be heard in the guidance of our [fol. 936g] Society, for without the Society we are all bankrupt financially and creatively.

If we fight each other now we will have dissipated the energies that we will need in the days ahead.

This Society is in the nature of a family and what individual member of a family likes all of his relatives. But if you sit down at the table and talk things over you may find out that Cousin Jim and Uncle John are not so bad after all. This is a far better method than the one used by the Hatfields and McCoys.

There is no war as bitter as a civil war.

Let us avoid it.

There is nothing that means more to all of us than ASCAP. Let us preserve it.

Let us not open our arms to possible disaster, for as Judge Ryan has said, and I quote:

"But, you know, the thought comes to my mind that if you people who are members of ASCAP can't agree amongst yourselves as to what is fair, when the government has made an impartial study and recommends it, you might wind up with no association at all, and you will have something to worry about."

[fol. 936h]

REMARKS OF MR. ARTHUR H. DEAN AT THE WEST COAST MEETING OF ASCAP ON NOVEMBER 11, 1959

In August, as your special counsel, I had the pleasure of speaking to the West Coast members of the Society for the first time. As you well remember, I then described in considerable detail the provisions of the proposed Consent Order, which, if signed by Judge Ryan, would amend the Consent Decree that was entered in 1950 in United States v. ASCAP.

This time, you will be pleased to learn, my remarks will be much briefer and far less technical. I will try only to summarize the present status of the proposed Consent Order and explain the single remaining question that will soon be put to the entire membership.

I. STATUS OF THE PROPOSED CONSENT ORDER

On October 19 and 20, 1959, hearings on the proposed Consent Order were held in New York before Judge Ryan, who is Chief Judge of the United States District Court for the Southern District of New York.

Before I describe those hearings, I would like to tell you just what Judge Ryan's role is in this whole proceeding. I do this so that you will understand why and how he is in a position to pass upon proposed rules and regulations that would govern the internal affairs of your Society.

In 1890, the Congress passed a law known as the Sherman Act, which made unlawful any contract, combination or conspiracy in restraint of trade. Its more common name is the "Antitrust Law".

Under the Antitrust Law, it is generally considered unlawful for a group of competitors to join together and pool their resources, and then to bargain together in common with the buyers of their products. The law is generally [fol. 936i] understood to apply to commercial business. But, in 1941, it was charged that ASCAP represented a combination of competing writers and publishers who, by

Jakes Biskop Burton Lene Larry Starts Flean Flynn Sydney arken. fint sweets Jack Stall. Det Mussmuse Juin that John andrews Norman VEllo Jow tred Hillebrand. Special. Berlmona John Winters Charles Frenn. Jeans of him Murray Loon Domenico Savino Line leter Helmy Kross Tood -Kochand Mufers War Rolling Turky Hermen tog as having Michel Parist Sich Charles Vipil Thomson Victhizzy Jack Lamerice Hardle Lone for the Ely Harburg

pooling their copyrights and offering blanket licenses, were violating the Antitrust Law.

And in 1941, ASCAP consented to a court order regulating certain aspects of its operations, particularly with its licensees.

The consent decree is the device whereby a defendant charged with violation of the Antitrust Law denies the violation, but, rather than to litigate that question with all its inherent risks, agrees to certain court restrictions on its activities.

Accordingly, the 1941 ASCAP consent decree contained several provisions with respect to ASCAP's licensing of its catalogue. It also contained a few provisions regulating the Society's relations with its own members.

In 1950, a second consent decree was entered in that case. It, too, set forth provisions affecting ASCAP's internal affairs.

Moreover, under the 1950 decree the Federal District Court in New York was specifically given continuing jurisdiction over this decree.

This means that the Government can go back to that Court and ask for further orders with respect to the operations of ASCAP. The Government must show, of course, that such additional orders are needed in order to protect the public interest in competition among song writers and song publishers.

Under the procedures of the Federal Court in New York, a specific judge is often assigned to a particular consent decree. This is so that the Court will be familiar with the general problems of that decree in the event further proceedings arise under it.

[fol. 936j] Chief Judge Ryan has been assigned to the ASCAP decree. Thus, he has the authority to determine whether any proposed amendment or modification of the decree will carry out the original antitrust objectives of the suit brought in 1941, or whether the case should be retried.

On June 29, 1959, the Department of Justice filed with the Court the proposed Consent Order we worked out with the Department of Justice.

Copies were sent to all the members of ASCAP. It was discussed at membership meetings here and in New York, and the members were given time to consider it.

On October 19 and 20, 1959, Judge Ryan conducted hearings on the proposed Consent Order.

At these hearings counsel for the Department of Justice explained the meaning and intended effect of the major provisions in the Consent Order. At the close of the Government's presentation, the following exchange took place between Judge Ryan and the attorney for the Department of Justice:

The Court: "All right. I understand now that it is the considered judgment of the Antitrust Division of the Attorney General's office that this proposed amended decree is the best in their judgment that can today be devised and framed."

Mr. Bennett: "That is my understanding, your Honor; that the alternative would be litigation on the

subject."

The Court: "And that your Department recommends it to the Court without reservation of any kind."

Mr. Bennett: "That is correct, your Honor." (Transcript, pp. 100-01).

Later in the hearings, Judge Ryan asked me to express my opinion, as special counsel for the Society, on the over-[fol. 936k] all significance of the proposed Consent Order. I shall quote that portion of the transcript:

The Court: "... The point involved here is do you feel, Mr. Dean, representing the Society, that you have accomplished the best possible results in light of the purposes of this suit for the Society as a whole and for its individual members?".

Mr. Dean: "Yes, your Honor, I do. I can say that unqualifiedly yes."

Judge Ryan's order of June 29th invited only those members who opposed the Consent Order, to attend the hearing and request to be heard.

Accordingly, apart from the lawyers of the Department of Justice, and myself as counsel for ASCAP, the very large number of members who wholeheartedly approve the proposed Order did not appear before Judge Ryan.

On October 19 and 20, Judge Ryan permitted members in opposition to the Order, either in person or by counsel, to state their objections to various provisions of the Order and to give their reason for the objections.

MAJOR OBJECTIONS

I would now like to take a few minutes of your time to summarize the major objections that were presented to Judge Ryan. I would then like to give a brief explanation of the reasons behind each of the principal provisions of the order that was objected to J

1. The Survey.

A few members objected that the new objective survey (which, as you know, went into effect on October 1 this year) will not take a complete census of all music performed on every radio and television station in the country. [fol. 9361] A few others criticized the fact that the new survey would not take a day by day census of all programs on the ABC radio network and all radio network sustaining programs, but instead would survey these programs on a scientific mathematical sampling basis.

In reply to these objections, I can assure you that over a year of thought and effort was spent by independent survey experts engaged to work out this survey.

The objective was always clear, however: we wanted the most accurate and representative music survey possible without prohibitive expense.

Thus the local radio survey was substantially increased.

After a reasonable trial period, the reviewing experts may conclude that changes may be necessary.

In this connection, I want to assure you that this survey, will be the object of constant study and that it will be periodically reevaluated by the experts in the light of experience.

In answer to the specific objections I mentioned: ABC radio programs will no longer be logged in their entirety. The reason for this is that the amount of revenue now received by ASCAP from that network no longer justifies such an expense.

Of course, ABC radio programs, such as "The Breakfast Club", will be picked up in the local survey and music performances thereon will receive their proper credit. Each ABC radio program included in the local survey will be checked against the ABC network logs to assure full identification of all music on the program.

Radio network sustaining programs are no longer being logged on a complete census basis for two reasons: (1) they do not generate enough ASCAP revenue to warrant such an expense; (2) the radio networks don't know how many [fol. 936m] affiliated stations carry any specific sustaining radio program.

In the event that non-identification of music picked up in the local survey is substantial, the Society will request logs from the local stations in question and will check them if they are available. The determination of the need for these logs will be made by the supervising survey organization in accordance with sound and accepted survey practice.

Some members have suggested that the survey be conducted in its entirety by an outside organization, including the collection and processing of the program logs and tapes. Now, we carefully considered this possibility, and concluded that no existing outside organization could collect and process the needed survey material at a cost anywhere near as low as that now being spent by ASCAP for these functions, or as accurately.

Moreover, you may rest assured that the survey will be periodically reviewed, by an independent outside organization, from top to bottom not only to make sure that the survey is fair and representative, but also to make sure that the local tapes are being properly monitored and that the network logs are being properly analyzed for credit purposes.

2. The Weighting Rules.

Some members have stated that no distinction should be made among different musical works when they are performed as non-feature uses, such as themes or as background, one or bridge music.

This problem was studied in painstaking detail by the Society, its counsel, and by the Department of Justice.

Everyone who considered the question at length came away with the same basic conclusion: i.e., there is generally [fol. 936n] a fundamental difference between the functional purpose served by a well-known song and the role played by relatively unknown music when the two are used as non-feature music.

A well-known song will usually be performed in a non-feature use, such as background music, only with the specific intent of projecting the image or memory associated with that song into the format or storyline of the program. Thus, throughout such a performance, regardless of its length, the well-known song plays a key role in the development of the program.

A relatively unknown work, on the other hand, is typically performed as a non-feature use with only a passing atmospheric effect on the audience.

A great deal of thought and research was given to the formulation of a sound and workable qualifying test that would distinguish truly well-known songs from the many thousands of works that are not recognized by the general listening public.

This test combines two requirements: (1) a work must have been a real national "hit" at one time, and (2) it must have been performed in recent years enough times to be considered as still "alive" in the minds and memories of most listeners.

I call your attention to the fact that a brand new song can qualify as soon astit receives 20,000 feature performance credits, an amount that is often accumulated by a real hit in its first year.

3. The Recognized Works Performance Fund.

Some writers have objected to the Recognized Works Performance Fund, which would distribute 30% of the money allocable to the writers' four-fund system on the [fol. 9360] basis of performances of works which are at least one year old.

The soundness of the theory underlying this fund is demonstrated again and again every time ASCAP sits down to bargain with its licensees.

The songs with the real earning power are those which have withstood the acid test of time. As a rough general rule, it can be said that songs that are played after the initial launching period of their first year are songs that have earned a real place in the public consciousness.

It is true that the current "hits" of today initially would not participate in the Recognized Works Performance. Fund. But the writers of these songs should remember that many of them will become the "standards" of tomorrow. And, to the extent that they are played, they will then share in the Recognized Works Performance Fund.

It is worth noting that the Recognized Works Performance Fund has been vigorously endorsed by many of the most successful writers who, as you know, have in the past been leaving in the Society, for distribution to the other writer members, a very substantial sum—about \$2 million last year—which would otherwise have been available to these successful writers if distribution were made solely on the basis of performances.

The most successful writers believe in the recognized works principle as giving a fair premium to the men and women whose songs have made a lasting contribution to American music.

Lastly, I point out that if a writer member believes the Recognized Works Performance Fund discriminates against the type of works in his catalog, he may for himself elect the current performance option and receive the exact pro rata of the writers' money that is represented by his most recent available performance credits,

[fol. 936p] 4: The Current Performance Option.

Two objections have been made by some writers to the Current Performance Option: (1) it is limited to the first 39,000 credits received by a wester in any one year; (2) the writers electing this option will not share in the substantial "flowdown" from the top approximately 100 writer members because of the diminishing credit per performance above 39,000 credits.

I think both of these objections are ill-founded. Let me tell you why.

It is true that members electing the current performance option thereby give up the right to share in this "flow-down". But, try as we would, we could not see how any member can be paid 100% on the current performance option basis for up to 39,000 performance credits, and also (have the right to share in the money which would have gone to the approximately 100 most successful writers if they also were paid strictly on a current performance basis.

As everyone in the Society knows, there is a truly magnificent tradition among the most successful writers of giving up much of the money to which they would otherwise be entitled on a strict performance credit basis.

The Society believes that so long as the top writers continue this tradition, the current performance option should be limited to 39,000 credits a year (which is now approximately the lowest average of any of the writers in Class 975 and above).

For any credits in excess of 39,000 in a given year, a writer electing the current performance option would be paid on the four-fund basis. Or, if a writer elects the current performance option, then if he so desires, he can switch to the four-fund basis (retreactively for that year and receive the advantage of averaging a big "hit" year over a five-year period.

[fol 936q] Let me be clear. There is, no penalty imposed upon a writer who has taken the current performance option and whose works then suddenly become very popular.

As for the second objection to the current performance option: the "flowdown" benefit of the four-fund system is part and parcel of an integrated distribution plan of ASCAP that also contains the elements of averaging, seniority, and recognized works.

None of these elements can be viewed separately. All must be taken together. Indeed, it is doubtful that the top writers would continue to endorse the "flowdown" if it were to be diverted to a system that did not have these elements.

Some of the older writer members of ASCAP who did so much to create the benefits of this Society which all members now enjoy, were initially vigorously opposed to the current performance option, which would permit other writers to avoid the principles of averaging, of recognized works and of seniority.

Yet, we tried to be as fair as possible to all members of the Society, including those who criticized these principles.

As a result, we have worked out this election whereby members can elect to receive distribution either on the four-fund system or under the current performance option.

5. The Publisher Voting Formula.

Some publisher members have objected to the proposed publishers' voting formula. They claim that it leaves too much voting power in the hands of the Society's most successful publishers.

On the other hand, it is clear that the many publisher members of ASCAP make extremely varying contributions to the value of the Society's catalog. A fair system of allocating votes must take account of this fact.

[fol. 936r] I firmly believe that the two different points of view have been reconciled in the proposed formula. Under that formula, as I pointed out in August, the voting

strength of the present top 10 publishers and their affiliates would be reduced from about 63% at present to about 37% of the total publisher votes. It is thus clear that this represents a very substantial reallocation and broadening of the publisher votes.

And, of course, under the new formula any group of publishers representing 1/12th of the total available publisher votes could elect a director by designating any eligible person in a petition filed with the Society 90 days in advance of the general election.

6. Access to Records.

Some members have complained that the proposed Consent Order does not assure them adequate access to the Society's records. I believe that these fears are without valid foundation.

Every member will be permitted complete access to information concerning his own works, provided his request is sufficiently specific so as to enable the Program Department to find the records he seeks.

He will also be permitted to see information relative to the performance records of other members' works if the inquiry is made in "good faith" in connection with his own financial interest as a member of ASCAP.

One of the lawyers at the hearing asked Judge Ryan who determines "good faith". Judge Ryan said he would.

It must always be borne in mind that ASCAP has records of very real economic significance for almost 7,000 actual and potential competitors. The Society would not be discharging its duty to those members if it permitted their key business records to be inspected by someone whose inquiry [fol. 936s] was not related to his legitimate interest as a member of the Society.

For the few members who have suggested that all records of the Society be opened to all members, I should like each of the members to consider whether he would be happy if someone who had written one song could become a member and thereby have unlimited access to all information regard-

ing the business affairs of every other member of the Society and be free to broadcast this information to the world, including BMI.

7. Foreign Revenue.

A few members have stated that all revenues collected by the Society from foreign sources should be distributed on the basis of the music performances as reported by those sources.

I can assure you that we have studied the foreign reports furnished to ASCAP and we have concluded that this task would be disproportionately expensive and, in some cases, impossible.

Thus, in order not to consume too much of the members' money in administrative and clerical expenses, the Consent Order requires the Society to distribute foreign revenues on the basis of the applicable foreign reports, to the extent those reports are reasonably usable, when more than \$200,000 a year is received from the source in question.

8. Elimination of Ten-Year Option and "Brakes" On Demotions In The Availability Fund.

Some members have criticized the proposed Order in so far as it would eliminate the ten-year option for averaging credits presently available to the writers. Other writer members have indicated keen disappointment over the proposed removal of the five-year "freeze" on Availability rankings.

[fol. 936t] The Society was, of course, extremely reluctant to take away any aspects of the Writers' Distributor Formula that provide some measure of financial security for writers and their families. We are dealing with an antitrust suit. And the Government asserted that one effect of these two features of the distribution system was to retard the rate of advancement of successful young writers and thus restrain competition.

What were we to do? There is only so much money to distribute. The Department of Justice argued that the older

writer members whose works had declined in popularity would receive a disproportionate share of the distributable revenues to the disadvantage of younger writers whose songs are currently more popular. The Department argued that the younger writers were being discouraged.

Therefore, in order to achieve a satisfactory over-all Consent Order, the Society agreed to eliminate these two provisions from the Writers' Distribution Formula.

I call your attention, however, to the fact that in the future classification demotions will be spread evenly over a three-year period.

A further special section in the proposed Writers' Distribution Formula provides that any ranking decreases between present classifications and initial classifications under the new formula will be spread even over a four-year transition period.

II. THE PROPOSED AMENDMENTS

A few days after the New York membership meeting on November 24, 1959, ballots will be sent to each member on which they can (a) express their approval or disapproval of the proposed Consent Order, and (b) vote on the adoption of amendments to the Society's Articles of Associa-[fol. 936u] tion which are necessary in order to carry out certain provisions of the proposed Consent Order.

Each member received a copy of the proposed Consent Order early in July. An additional copy will be mailed to each member together with the ballot.

You all have recently received in the mail a copy of the proposed amendments to the Articles of Association which must be approved before the proposed Consent Order can be signed.

Because some of you may lose or misplace these proposed amendments before the ballot is received, an additional copy will be enclosed with the ballot.

I propose now-at this point-to summarize very briefly the proposed amendments to the Articles of Association:

- (1) Resigning members meeting the applicable requirements would receive distributions for works that continue to be licensed by ASCAP;
- (2) In addition to the persons nominated by the Nominating Committees, the list of candidates for directors would include any eligible person named by 25 or more members of the respective class in question;
- (3) The basis for allocating votes would be amended so as to substitute the new voting formulae;
- (4) The voting provisions would be amended to include the provision for election of a director by a group representing 1/12th or more of the writer or publisher votes;
- (5) The proposed amendments would provide that any member, writer or publisher, who received no performance credits in the latest available fiscal survey year would not be entitled to vote;
- [fol. 936v] (6) The percentage of total available, publisher votes that could be cast by the top ten publisher members and their affiliates would be limited to 40.8%, or 10% more than the voting strength they would initially have (37.1%);
 - (7) A special provision would permit the Board of Directors to hold the next directors' election prior to 1961, when it would normally be held. This provision is in response to Judge Ryan's request that an election under the new voting formulae be held as soon as possible if the Consent Order is approved;
 - (8) The Articles would provide that all rules and regulations affecting distribution would be mailed by ASCAP to all members of the class affected thereby;
 - (9) The Articles would reflect the accelerated procedure for handling distribution complaints. Complaints would be entertained, in the first instance, by the impartial Board of Review to be elected by the members, not by the respective Classification Committees. An appeal from a decision by the Board of Re-

view could be taken directly to an impartial Panel of, the American Arbitration Association;

(10) The composition of the Board of Review would be determined on the same basis now applicable to the existing Board of Appeals, except that the new voting formulae would be used.

The other changes in the Society's practices that would be required by the Consent Order do not entail changes in the Articles of Association.

[fol. 936w] III: FUTURE CHANGES

I should like to emphasize that there are many areas in which future changes and improvements could still be made if the Consent Order were adopted. In many respects, the Consent Order would be like a broad constitution: specific legislation by the Board of Directors would still be needed to carry out its rather general principles.

In this connection, I must emphasize that you will only be asked to vote for or against the Consent Order itself—not for or against the Writers' Distribution Formula and the Weighting Formula.

Those two formulae would be deemed by the Department to be initially in compliance with the more general provisions of the Consent Order.

It is essential to bear in mind, however, that those formulae could be reevaluated and changed from time to time in the light of experience under them. Of course, 30 days advance notice of such changes would have to be given to the Department of Justice and the changes would have to be consistent with the broad principles contained in the Consent Order.

You should all read the Consent Order carefully to see which provisions it contains and which provisions appear only in the Formulae.

For example, the proposed Order provides only that the Recognized Works Performance Fund shall not exceed 30% of the revenue distributed under the Writers' four-fund system.

, Likewise, the Weighting Rules, which would be part of the Order itself, permit the Society to impose limitations on the credit "to be awarded to multiple performances of the same work or aggregate performances of all works on a single program or during a period of programming or [fol. 936x] on a continuous series of the same program which is presented two or more times per week."

The Weighting Formula contains certain specific provisions that would carry out these principles. It may develop, however, that changes in or additions to the specific formula provisions may be found necessary, in the light of actual experience, in order to achieve the fairest possible system of distribution.

As for the survey, the Consent Order sets forth certain broad principles.

I assure you that study of the survey will be continued and that changes can be made in the light of experience under the new plan.

I mention only a few of the more important points. The Board of Directors will continue to study and evaluate the rules and practices of the Society in the attempt to conduct ASCAP in the best interests of the general membership and the public.

IV. GENERAL OBSERVATIONS

My advice to the Membership on the problem now before you can best be summed up by quoting a concluding observation of Judge Ryan towards the end of the hearings:

"While individual members may have objection to one particular subdivision of the decree they may feel that others are advantageous and desirable and that on an overall basis they will take the bad with the good to accomplish an overall improvement. That would be my idea." (Transcript, p. 351)

I know that some of you are not happy with every one of the provisions of the proposed Order. It would be preposterous for me to tell you that everything will improve for everyone. You know as well as I do that there is just [fol. 936y] so much money to distribute every year, and that if one class of members gets more by virtue of a new provision, some other class of members will get less.

I do believe, however, that—taken as a whole—the proposed Consent Order will achieve real improvements in the Society's rules and practices and in your public relations and in your relationship with the Government. I truly think the Consent Order would be in the best interests of the general membership.

I would like now to describe briefly the technical details of the vote soon to be taken by the membership.

Each member should receive a ballot in the mail around November 30th or December 1st. You will be asked to cast a single vote—either "yes" or "no". That vote will be for two purposes:

- (1) to express your approval or disapproval of the Consent Order as a whole. There will be no piecemeal voting for the Order, provision by provision;
- (2) to vote for or against the proposed amendments to the Articles of Association, which would be needed to carry out certain provisions of the Consent Order.

As an unincorporated association subject to New York law, the Articles of Association can be amended only as provided in the Articles themselves.

The Articles provide that each member shall be sent a numbered ballot, which can be replaced if it is lost or torn or for any reason cannot be used. If that occurs, please ask immediately for another ballot.

The Articles of Association also require that the ballot be signed, and that it be received by ASCAP within 20 days of the date the ballot was mailed by ASCAP. Ballots received after that date cannot be counted.

[fol. 936z] Votes will be counted according to the existing provisions of the Articles of Association. Thus, each writer member has one vote for every \$20 he received from ASCAP in the year ended December 31, 1958, and every

publisher member has one vote for every \$500 he received during that period, with a minimum of one vote per member.

For an amendment to the Articles of Association to be adopted, it must receive the affirmative vote of an average of two-thirds (1) of the writer votes eligible to be cast and (2) of the publisher votes eligible to be cast, the votes to be computed in accordance with the provisions of the Articles of Association which I have just described.

It is therefore crucial that every member cast his vote.

If the requisite number of members vote "yes" on the ballot, the Articles of Association will be adopted and put into effect.

Judge Ryan also requested that—for his own information and solely on the question of the approval or disapproval of the proposed Consent Order—the votes to be tabulated in two ways, first, on the basis of the weighted vote presently provided in the Articles of Association, and second, on a numerical or member-by-member basis.

I cannot tell what significance will be attached by Judge Ryan to the numerical tabulation of "yes" and "no" votes on the proposed Consent Order. For example, a numerical vote may not be meaningful if most of the "no" votes are east by members whose catalogues in the latest available fiscal survey year have received no performance credits, of where the performance credits were so few, for example, as barely to cover the member's annual dues.

In conclusion, let me state that I was retained—presumably because of my antitrust and government experience—to act as special counsel for this unincorporated membership association on this antitrust suit brought by the Gov-[fol. 936aa] ernment. As such, I have done my best to represent the Society as a whole, as well as all of its members.

I have advised the Board of Directors as to what in my Judgment was the best solution of the demands by the Department of Justice to amend the ASCAP consent decree. And, in this connection, I have advised how the Society

could best continue to serve all of its members fairly and impartially.

Some members have asked why I did not recommend that we litigate with the Department of Justice, to prove that the Society had not in fact been violating either the 1950 consent decree or the requirements of the antitrust laws.

My answer was that litigation is a horse race and there is always a possibility that the best horse, even after clearing the last barrier, can throw a shoe or stumble in the home stretch. In other words, no lawyer can tell in advance exactly how a complicated antitrust lawsuit will turn out—how the evidence will be received by the Judge.

Therefore, we took it to be our job as special counsel, to weigh the purposes of ASCAP, to view the practices of ASCAP objectively, and to work out such changes as seemed necessary and desirable to achieve a result satisfactory to the Department of Justice, to Judge Ryan and, of course, to ASCAP and its members.

I firmly believe that the proposed Consent Order, and the amendments to the Articles of Association necessary to put the proposed Order into effect, are in the best interest of all of the members.

. I therefore urge every member of the Society to cast his vote on the forthcoming ballot, and I urge that the vote be cast in favor of approval of the proposed Consent Order and the required amendments to the Articles of Association.

'This is a crucial matter for the Society and all of its members, and therefore you are faced with a crucial choice.

[fol. 936bb] To reject this proposed Consent Order would be to invite the grave hazards of litigation, and, as Judge Ryan pointed out at the bearings in New York last month, a possible result of such a trial might be a judicial order requiring the dissolution of ASCAP, a result which, I am sure, no member wants.

If any member of ASCAP urges you to vote "No"—to risk dissolution or to risk possibly adverse legislation or even stricter government regulation, I suggest you ask him wherein his real interest lies—in ASCAP or elsewhere.

[fol. 937]

EXHIBIT "L"

MURRAY HILL S-8800

CABLE ADDRESS: ASCAP, NEW YORK

AMERICAN SOCIETY OF COMPOSERS, AUTHORS and PUBLISHERS 575 Madison Avenue New York 22, N. Y.

STANLEY ADAMS
PRESIDENT

November 30, 1959

IMPORTANT

TO ALL MEMBERS OF THE SOCIETY:

In response to a number of inquiries and to clarify the matter, I wish to advise that the Board of Directors has unanimously approved the proposed Consent Order and urges you to vote "YES".

Sincerely yours,

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

· /s/ STANLEY ADAMS
Stanley Adams
President

[fol. 938]

MURRAY HULL S-SS00

'CABLE ADDRESS : (ASCAP, NEW YORK

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

575 Madison Avenue New York 22, N. Y.

STANLEY ADAMS'

December 5, 1959

TO ALL MEMBERS OF THE SOCIETY;

On November 29, 1959, a ballot on the proposed amendments to the 1950 ASCAP Consent Judgment and on the proposed amendments to the Articles of Association was mailed to each of you.

Your ballot, with your vote indicated on it, must be received by midnight, Saturday, December 19, 1959. In view, of the heavy Christmas mail, please be sure to vote as soon as possible.

If your ballot has been lost, misplaced, mutilated or destroyed, please write to Mr. Herman Finkelstein, General Attorney for the Society, informing him of that fact and he will arrange for its replacement.

In the past three weeks you have received several letters with respect to the proposed amendments to the Consent Judgment.

Some of those who have urged a "no" vote have quoted excerpts from a memorandum filed by the Department of Justice with Chief Judge Ryan. It is important that you know that these quoted excerpts are references to criticisms of existing rules which will be changed by the proposed amendments to the Consent Judgment if you vote "yes".

The Department of Justice has made no criticism of the provisions of these proposed amendments but instead has asked that they be approved by Chief Judge Ryan. The

Department's memorandum states that the amendments are designed to remedy the criticisms of the existing rules quoted in Some of the communications which urge a "no" vote. However, that fact was not called to your attention.

The Board of Directors, in standing squarely behind the proposed amendments, agrees with the statement of the Department of Justice to Judge Ryan that it is the considered judgment of the Antitrust Division that this proposed amended decree "is the best in their judgment that can today be devised and framed."

We therefore believe that its approval by the membership and by Chief Judge Ryan would be a real step forward in the development and improvement of our great Society.

Vote "Yes" today.

Sincerely yours,

/s/ STANLEY ADAMS
Stanley Adams,
President.

[fol. 939]

Ехнівіт "N-1"

MURRAY HILL S-8800 .

. CABLE ADDRESS: ASCAP, NEW YORK

AMERICAN SOCIETY OF COMPOSERS, AUTHORS and PUBLISHERS 575 Madison Avenue New York 22, N. Y.

STANLEY ADAMS
PRESIDENT

December 3rd, 1959

DEAR FELLOW MEMBER:

At the Membership Meetings in New York, California, and Chicago, I promised to appoint an Advisory Committee within three months after the amendments to the Consent Judgment are approved.

The response from the membership has been most gratifying.

Because you may have missed the enclosed article showing Variety's appraisal of what is regarded as a progressive step, I am sending a copy to all writer members.

Sincerely yours,

/s/ STANLEY ADAMS
Stanley Adams,
President.

Encl. SA:AW



We The People' Songsmith Panel Eyed by ASCAP

greater harmony in the ranks, ASCAP prexy Stanley Adams has recommended the formation of a consultative writers' committee taking in all geographical areas and clefting categories within the membership. The committee would be a loosely representative body, open to virtually everyone and capable of serving as a sounding board for criticism and recommendations.

Adams pointed out that a similar committee was in operation within ASCAP during his previous administration as ASCAP prexy around four years ago. While having no legislative authority, the writers' committee came up with several suggestions that got favorable reaction from the board.

It's figured if the ASCAP administration can provide a workable forum for the dissidents, all the essential problems in the organization could be solved internally without recourse to judicial intervention.

[fol. 942]

Ехнівіт "Р"

December 4, 1959

Sidney Rothstein, Esq. 350 Broadway New York 13, N. Y.

Re: U.S. v. ASCAP

Dear Mr. Rothstein: .

Enclosed is the Society's check in the amount of \$720.53 for expenses incurred in connection with the mailing which was completed on November 24, 1959.

Sincerely yours,

Herman Finkelstein

HF:H enc.

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DISTRICTCO				•	
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One-half of percentage of writer members voting "YES"	40 88 7.	~			
PUBLISHER MEMBERS:		424	424	33/	3
bb 2 to 3 vates cc 4 to 5 dd 6 to 10 ee 11 to 20 ff gver 20		53 25 26 20 22 15	126 114 3.5 486 17.596	37 14 11 16 25	2 2 4
Total of publisher members voting "YES"	19.051	657	19.51	440	28
Total of publisher members eligible votes Percentage of publisher members voting "YES" One-half of parcentage of publisher members woting "YES"	84.3c % 42.15%				

U.S. v. ASCAP

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[fol. 957]

COURT'S EXHIBIT "K"

United States District Court
Southern District of New York
Civil Action No. 13-95

UNITED STATES OF AMERICA,

Plaintiff,

__v.__

American Society of Composers, Authors and Publishers,

Defendant.

This is to certify that the American Society of Composers, Authors and Publishers (hereinafter "the Society") has submitted to its membership all portions of the proposed consent further amended Final Judgment attached to the order of this Court signed by Chief Judge Sylvester J. Ryan and dated June 29th, 1959, as to which the consent of the membership is required by the Articles of Association of the Society, and that the Board of Directors of the Society has recommended to said members that said consent be given.

This is further to certify that the required consent has been given.

This statement is made pursuant to Article VII of said proposed consent further amended Final Judgment.

Dated January 6, 1960.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

. By /s/ STANLEY ADAMS
Stanley Adams
President.

[fol. 958]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 13-95

UNITED STATES OF AMERICA, Plaintiff,

-V.-

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, Defendant.

ORDER ADJUDGING THAT ARTICLE VII OF THE PROPOSED CON-SENT ORDER HAS BEEN COMPLIED WITH AND EFFECTIVE DATE OF SAID CONSENT ORDER IS JANUARY-7, 1960, EN-TERED JANUARY 7, 1960

The defendant American Society of Composers, Authors and Publishers (hereinafter "the Society") having conducted, pursuant to the direction of the Court, an election in which the members of the Society voted on whether or not to approve the proposed Consent Order further amending the Amended Final Judgment entered herein on March 14, 1950, and to adopt the amendments to the Society's Articles of Association required by saic proposed Consent Order; and

The ballots having been tabulated in open court on January 6, 1960, and the Court having found that the result

of the balloting was as follows:

Of the total eligible votes of writer members, weighted in accordance with the Society's present Articles of Association, 81.75% of the votes were east in favor of approving said proposed Consent Order and said amendments to the Society's Articles of Association.

Of the total eligible votes of publisher members, weighted in accordance with the Society's present Articles of Association, \$4.30% of the votes were cast in favor of [fol. 959] approving said proposed Consent Order and said amendments to the Society's Articles of Associa-

Averaging these two results as provided in said Articles of Association, this represents 83.03%, which is more than is required by said Articles of Association to amend said Articles of Association;

and .

The Court having found that, of the members actually voting, 2,977 writer members and 652 publisher members voted in favor of said proposed Consent Order and said amendments to said Articles of Association, with 1,285 writer members and 440 publisher members voting against; and

After reading the statement of American Society of Composers, Authors and Publishers, by Stanley Adams, President, dated January 6, 1960 and filed January 7, 1960, certifying that the Society has submitted to its membership all portions of said proposed Consent Order as to which the consent of the members is required by the Articles of Association of the Society, and that the required consent has been given; it is hereby

Ordered that Article VII of said proposed Consent Order has been complied with, and that therefore the effective date of said Consent Order is January 7, 1960.

Dated January 7, 1960.

Sylvester J. Ryan, Chief Judge.

[fol. 960]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 13-95

UNITED STATES OF AMERICA, Plaintiff,

v

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, et al., Defendants.

CONSENT AND ORDER AMENDING PROPOSED FURTHER AMENDED FINAL JUDGMENT ATTACHED TO SHOW CAUSE ORDER Dated June 29, 1959, Entered January 7, 1960

Upon the annexed consent of the parties hereto, it is hereby

Ordered that the proposed consent further amended Final Judgment attached to the order to show cause herein signed by Chief Judge Sylvester J. Ryan and dated June 29, 1959, is hereby amended by

- 1. deleting the words "one year" in the first line of subsection (D) of Section V and substituting therefor the words "six months";
- 2. deleting the years "1959", "1958", "1959", "1960", "1961", and "1962", respectively, in paragraphs (b) and (c) of Attachment A thereto and substituting therefor the years "1960", "1959", "1960", "1961", "1962", and "1963", respectively;
- 3. deleting the date "September 30, 1959" in the heading of Attachment B thereto and substituting therefor the date "September 30, 1960";
- 4. deleting the phrases "October 1959-55%" and "October 1959-15%" where they appear in Plan I of attachment B thereto;

• [fol. 961] ² 5. deleting the date "September 30, 1959" in the heading of Attachment C thereto and substituting therefor the date "March 31, 1960"; and it is further

Ordered that the document entitled "Writers' Distribution Formula" submitted with the proposed consent further amended Final Judgment is hereby amended by

- 1. deleting the date "September 30, 1959" in the heading and substituting therefor the date "September 30, 1960"; and
- 2. deleting the years "1959", "1958", "1959", "1960", "1961", "1962", and "1960", respectively, from paragraph (2) of subsection (c) of Section II thereof and substituting therefor the years "1960", "1959", "1960", "1961", "1962", "1963", and "1961", respectively; and it is further

Ordered that the document entitled "Weighting Formula" submitted with the proposed consent further amended Final Judgment is hereby amended by deleting the date "September 30, 1959" in the heading and substituting therefor the date "March 31, 1900".

Dated: January 7th, 1960.

Sylvester J. Ryan, Chief Judge.

We hereby consent to the making and entry of the above order.

Richard B. O'Donnell, Attorney for Plaintiff.

Arthur H. Dean, Attorney for Defendant American Society of Composers, Authors and Publishers. [fol. 962]

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK Civil Action No. 13-95

- UNITED STATES OF AMERICA, Plaintiff,

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, Defendant,

ORDER APPOINTING THE HON. JOHN E. McGEEHAN AND THE HON. IRVING M. IVES TO EXAMINE THE SURVEY, ENTERED JANUARY 7, 1960

The Court having this day signed a Consent Order further amending the amended final judgment herein of March 14, 1950; and

Said Consent Order providing in Section II, Subsection (C):

(C) The Court, after hearing the recommendation of the plaintiff and the views of the defendant, shall appoint a qualified independent person, not an employee of either of the parties, who periodically as is necessary shall examine the design and conduct of the survey, make estimates of the accuracy of the samples, and report thereon to the Court and the parties. ASCAP shall pay the salary and reasonable expenses of such person."

; and

The Court having heard the recommendations of the plaintiff and the views of the defendant, it is hereby

Ordered that the Honorable John E. McGeehan and Honorable Irving M. Ives, each of whom is a qualified, independent person and not an employee of either of the parties, are hereby appointed to examine, periodically as is necessary, the design and conduct of the survey provided for in said Section II of said Consent Order, to make esti-

mates of the accuracy of the samples, and to report thereon to the Court and the parties; and it is further

Ordered that American Society of Composers, Authors and Publishers shall pay the salaries and reasonable ex-[fol. 963] penses of said persons, the salaries to be fixed by the Court upon application of said persons or of the defendant American Society of Composers, Authors and Publishers.

Dated January 7th, 1960.

Sylvester J. Ryan, Chief Judge.

[fol. 964]

Civ. 13-95

UNITED STATES OF AMERICA

VS.

AMERICAN SCHETY OF COMPOSERS, AUTHORS AND PUBLISHERS

Before: Hon. Sylvester J. Ryan, Chief Judge.

Appearances: William D. Kilgore, Jr., Alfred Karsted, John L. Wilson, Richard B. O'Donnell and Walter K. Bennett for plaintiff.

Arthur H. Dean, Howard T. Milman, Herman Finkelstein, Lloyd N. Cutler, Ferdinand Pecora, David H. Horowitz, and Frederick A. Terry, Jr. for defendants.

Lee V. Eastman, Herbert Chevette, Charles Horsky, Alvin Friedman, Arthur L. Fishbein, Sidney W. Rothstein, Morton Schaeffer, Leonard Zissu, Edward Niles, and Bernard Kaufman, appearing as counsel for various members of defendant as amici curiae, and Edgar Battle, Bob A. Davis and Perry Bradford members of defendant appearing prose as amici curiae.

Opinion-January 7, 1960

[fol. 965] Sylvester J. Ryan, Chief Judge:

The Government, with the consent of defendant ASCAP, moved on June 29, 1959, for an order further amending the

amended final consent judgment entered on March 14, 1950 (which had amended the final consent judgment of March 4, 1941). This motion came on to be heard on October 19, 1959; all the members of ASCAP had been duly served as directed by order of the Court with a copy of the proposed amended final judgment, and the Government and those members of ASCAP who made application were heard either in person or by attorney in support of and in opposition to the motion, as "friends of the Court."

The proposed final judgment resulted from extended negotiations between the Government and ASCAP following an investigation by the Justice Department of complaints from the various members of ASCAP that the antitrust purposes of the 1950 amended consent judgment were not

being served.

Although ASCAP does not admit any of the Government's allegations, it was found and agreed by the parties during these discussions that existing practices in six aspects of ASCAP's operations should be changed and that modifications and additional provisions embodied in the proposed amended consent judgment would more fully actfol. 966] complish the antitrust purposes of the 1950 judgment.

Briefly, these provisions are:

- (1) Under existing practice the Government claims that a resigning member receives a negligible sum from licenses of works remaining in the ASCAP repertory and nothing from future licenses on works so remaining, thus effectively denying him the right to withdraw. Section I would require ASCAP to pay a resigning member for performance of his works remaining in the ASCAP repertory by reason of continued membership of a co-writer or publisher, while permitting him to license future works to another organization and thus make it feasible for him to resign.
- (2) Under Section II, a scientific objective survey is to be the basis upon which distribution of revenue to ASCAP members is to be made. This survey is designed to more accurately and properly reflect the number of performances and the revenue attributable to these performances. This is to replace what the Government charges was a rather arbi-

		Arr
TOTALS		
Total of publisher members voting "YES"	19051	
Total of publisher members cilgible votes	22 598.	
Percentage of publisher members voting "YES"	84.30%	4
One-half of parcentage of publisher members woting "YES"	H7.15%	
FINAL SUMMARY OF BALLOTS		
One-half of percentage of writer members voting "YES"	4c.88 %	
One-half of parcentage of publisher members voting "YES"	42.15%	
	83.03%	
Percentage of ALL members voting "YES"	07.05/0	

trary and unbalanced survey which gave undue emphasis to network broadcasting performances and failed otherwise [fol. 967] to distribute in proper proportion to sources of the income received. The new survey provides for a 50 percent increase in the local radio samples, and a broader random selection of the stations sampled, in addition to a survey of nightclub, dance hall and wire music system performances. Further relief may be sought by the Government in respect of this survey, and the Court as well as the parties are to be provided with the advice of two independent and impartial advisers on the operations under this survey system.

(3) Section III sets forth the most significant change in the consent judgment; it vests the power to control the distribution of the Society's revenues among its members.

The Department of Justice is of the view that in the plan of distribution in effect under the 1950 consent judgment, seniority considerations and the will of the "controlling" group are emphasized as to members, songs and performance credit averaging to such a degree that young writers and publishers are being discouraged from writing and publishing new songs. Objection is also made by the Department to the classification system and its carryover effects, [fol. 968] as being weighted too heavily in favor of the older writer members. ASCAP yigorously defends the fairness of its system and does not admit the Government's contentions, and although this section represents a compromise, it is a substantial improvement over the present methods.

The new consent judgment will provide.

(a) In distribution of revenue, an option is given members whereby they can either elect to receive distribution solely on the basis of current performance (that is 100 percent up to a certain limit which, if surpassed, would place the member within the top group of approximately 100 writer members) or under a multiple fund plan comparable to that now in effect. Under either plan, the weight given to seniority is diminished; in fact, if a writer or publisher chooses the current performance plan, seniority is not a factor in the majority of instances, while under the multiple

fund plan, it loses some of its effect because of the shorter option period and the opportunity to rise or fall more rapidly within certain of the funds.

(b) With respect to the weighting rules the new judgment sets up an entirely new system. When an ASCAP composition is performed and picked up on the survey, it is [fol. 969] given a value according to the weighting rules. The basic unit used is a performance credit and it is by increasing a member's number of performance credits that a member increases his revenue.

The great fluctuation in credit given to different songs performed in the same manner was one of the major grievances brought to the attention of the Justice Department. In the past, it was possible for credit to fluctuate as much as 1000 to 1 on the performance of different compositions as themes, jingles, background, cue or bridge music. Under the new system, this ratio has been cut in most instances to at most 10 to 1 and in isolated instances to no more than 100 to 1. The test used to qualify compositions for the 10 to 1 ratio has also been changed to allow more for the performance record of the piece and less for the discretion of the board.

- (c) Foreign revenues are to be distributed according to reports received from any country yielding \$200,000 or more in revenue; formerly revenue from countries other than Canada was distributed on the basis of the English and Swedish reports only.
- (4) Section IV is designed to effectuate the object of [fol. 970] Section XIII of the 1950 consent judgment "to insure a democratic administration of the affairs of ASCAP" in order that unfair advantage may not be given one group of members over their competitors within the Society. The Government alleges that at present complete control over votes and revenues is in the hands of the Board of Directors, who are a self-perpetuating body, as they are elected by those members with the greatest number of votes which number is in turn determined by the share in revenues, which is determined by rules of distribution enacted by the Board.

The alleged result is that less than a percent of the writermembers and less than one percent of the publisher-members have the power to elect all the directors. The proposed order, by weighting votes on the basis of performance credits rather than on ASCAP income, by limiting the number of votes and by setting up a graduated scale of performance credits, would provide for truer representation of all members.

- (5) Section V—The Government claims that under present conditions, because of the complex and expensive procedure, it is just about impossible for a member to enforce [fol. 971] his right to appeal his classification. The new section provides for a direct appeal to an impartial board, for access by a member to records of his own works and that of others, and for retroactive payments and full disclosure and reports by the ASCAP to its members.
- (6) Finally under Section VI, ASCAP is directed to grant qualified applicants membership without regard to prior ASCAP performance and to make public requisite qualifications.

The proposed judgment has been consented to by the attorneys for ASCAP with the unanimous approval of the Board of Directors as in their judgment accomplishing the best possible results for the Society as a whole and for its individual members. It is also the belief of the Antitrust Division that the decree is the best that today can be devised and framed; it recommends approval by the Court without qualification.

After careful consideration by the Court of the arguments for and against the approval of this proposed consent judgment, the Court finds that although not a panacea for all the alleged ills besetting the Society, the decree does represent definite improvement over existing procedures and that it will serve to advance the antitrust purposes [fol. 972] of the Government suit and of the prior decrees.

. The approval of the attorneys for the Society was conditioned on the vote of the membership to amend the Articles of Association in order to make them consistent with the provisions of the proposed Order, approving or disapproving the proposed Order and authorizing the Society's

consent to it. The votes tabulated in open court are in favor of amending the Articles and adopting the proposed Order, and itsis so approved by this Court.

Accordingly, the Court has determined and concluded that the proposed consent decree should be signed and will be

signed by the Court.

Dated, New York, January 7, 1960

* Sylvester J. Ryan, U.S.D.J.

[fol. 973]

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 13-95

UNITED STATES OF AMERICA, Plaintiff,

V.

American Society of Composers, Authors and Publishers, et al., Defendants.

Consent Further Amended Final Judgment— Entered January 7, 1960.

Plaintiff having filed its Complaint herein on February 26, 1941, the parties having consented to the entry of a Civil Decree and Judgment filed March 4, 1941, and the parties having consented to the entry of an Amended Final Judgment on March 14, 1950 (hereinafter referred to as the "Judgment"),

Now, Therefore, no testimony having been taken and without trial or adjudication of any issue of fact or law herein and without admission by any party in respect of any such issue, the Court having heard the parties and upon consent of all parties hereto, it is hereby

Ordered, Adjudged and Decreed as follows:

In carrying out the provisions of subsection (6) of Section IV of the Judgment ASCAP shall provide that any writer or publisher member who resigns from ASCAP and [fol. 974] whose works continue to be licensed by ASCAP by reason of the continued membership of a co-writer, writer or publisher of any such works, may elect to continue receiving distribution for such works on the same basis and. with the same elections as a member would have, so long, as the resigning member does not license the works to any other performing rights licensing organization for performance in the United States. The Society may require a written acknowledgment from such resigning member that the works have not been so licensed. In any event, a resigning member shall receive distribution from the Society on the basis of performances made under licenses in effect at the time of the member's resignation. Anything to the contrary notwithstanding, the Society may, at its option, deny resigning members the right to receive payment on. any basis other than a current performance basis as defined in Section III and "Attachments A and B" of this Order, provided that such option must be exercised as to, all resigning members alike.

П

ASCAP shall carry out the provisions of Section XI of the Judgment concerning surveys of performances, as follows:

(A) ASCAP shall conduct or cause to have conducted a census and/or a scientific sample of the performances of the compositions of its members. Such census and/or scientific sample shall be made in accordance with the design made and periodically reviewed by an independent and qualified person or firm. Any such sample shall be selected randomly and shall be properly weighted by the use of sample blow-up, multipliers determined by dividing the total number of hours of performance in each sampling cell being [fol. 975] sampled by the number of hours actually sampled. The depth of sample may differ among strata, sub-strata or

sampling cells, and shall be determined for each by considerations of sampling efficiency. Economic multipliers shall be applied to the results of the samples and census to reflect the dollar revenue to ASCAP of performances in the various strata. The economic multipliers will be applied to the survey findings of the sample independently and separately from sample blow-up multipliers. Furthermore, the economic multipliers to be applied to the performances estimated by the sample shall be based upon the proportion of ASCAP's dollar receipts derived from the licensees or group of licensees from which the performances emanate. For this purpose licensees (or performances) may be grouped so as to reflect differences in economic value of performances insofar as ractical, taking into account the added costs and complexity of finer classifications. Economic multipliers for radio and belevision network broadeasts may vary systematically to reflect variation in the economic value of the audience as reflected by ASCAP's dollar revenue. In determining the revenue from radio and television network broadcasts, ASCAP may take into consideration the revenue received from affiliated station announcements adjacent to and reasonably attributable to network programs carried by the affiliate. ASCAP shall endeavor to obtain logs of performances prepared by such local radio and television stations as the surveying organization deems necessary (1) to reduce non-identifications from tape recordings of performances (an effort must be made to reduce non-identifications on any half hour of continuous programming containing more than three unidentified feature performances by requesting the station to furnish a log if available) and to supplement the survey of performances where such identification is difficult, e.g., foreign language stations, good music stations, background music stations; and (2) to test and correct the accuracy of the surveys made by means of tape recordings.

[fol. 976] (B) After eighteen months from date of entry of this Order plaintiff may seek additional relief in respect to the provisions of this Section, including the scope, size or accuracy of the survey. In any such proceeding the plaintiff need show only that the survey is not established

or is not being conducted in accordance with generally accepted principles of scientific surveying or sampling, that the economic multipliers do not adequately reflect the dollar value to ASCAP of performances in the Arious strata, or that the sample is not of sufficient size or accuracy to permit a reasonably accurate distribution of ASCAP's revenues on the basis of its results. In such proceeding the Court may consider the cost of such additional relief.

(C) The Court, after hearing the recommendation of the plaintiff and the views of the defendant, shall appoint a qualified independent person, not an employee of either of the parties, who periodically as is necessary shall examine the design and conduct of the survey, make estimates of the accuracy of the samples, and report thereon to the Court and the parties. ASCAP shall pay the salary and reasonable expenses of such person.

III

Defendant ASCAP shall carry out the provisions of Section XI of the Judgment concerning distribution to its members, as follows:

(A) As to ASCAP's domestic revenues, beginning with the effective date of this Order, each writer member shall be given the option of electing to receive distribution (i) on a current performance basis under Plan II as described in Part II of Attachment A or (ii) on the basis of Plan I described in Part I of Attachment A. Failure to elect shall be deemed an election to receive on the basis of Plan I. Election to receive distribution on a current performance [fol. 977] basis must be made in writing and, if delivered to ASCAP not later than 30 days after the effective date of this Order, it shall apply to distributions based on performance credits recorded during the fiscal survey year commencing October 1, 1959 and the fiscal survey years thereafter to which the election is applicable. New writer members are to be given the option to make such election within thirty days of receiving notification of the acceptance · of their membership application. In addition: writer members shall have the following options:

- (1) A writer member who has elected to receive distribution under Plan I shall have an annual option to cancel such election effective for credits recorded in any succeeding fiscal survey year.
- (2) A writer member who has elected to receive distribution under Plan II shall at any time after two years have one option to cancel such election effective for credits recorded in the subsequent fiscal survey year; thereafter should such writer member, within the period of the next five years, again elect to return to Plan II pursuant to the option given in paragraph (1) of this subsection (A), such election shall be binding for a period of five years.
- (3) All elections and cancellations of elections shall be made by written notice delivered to ASCAP not later than 30 days before the first day of the fiscal survey year during which the performance credits applicable to such election are recorded and to which such election or cancellation of election is applicable.
- (B) Notwithstanding the provisions of subsection (A) above, ASCAP my promulgate a rule withholding the option to receive distribution on a current performance basis from the group of writer members; reasonably calculated not to exceed 100, having the highest average performance credits recorded in the five preceding fiscal survey years, [fol. 978] provided that, within three months after the entry of this Order, in a vote held for such purpose, such rule is approved by a majority vote of such writer members, For purposes of this paragraph, a majority vote must include both (1) the votes of a majority of the writer members who cast ballots and (2) the votes of the writer members holding a majority of all performance credits during the five latest preceding fiscal survey years for which records are available out of the total number of such performance credits held by all writer members who cast ballots.

At any time not earlier than three years after the date of entry of this Order, upon written request signed by (1) the Assistant Attorney General or (2) either 25% of the number of writer members then subject to such rule, or 25 such, writer members, whichever is fewer, or (3) writer members having 25% of the performance credits in the latest available five preceding fiscal survey years out of the total number of performance credits of all writer members subject to such rule, a new vote shall be held to determine whether a majority, as defined above, of the group of writer members subject to such rule adhere to the determination that no current performance option should be available to such group, provided that nothing contained herein shall require ASCAP to had such a vote upon a request by members more frequently than once every three years.

For purposes of this subsection (B), all successors of a deceased writer member shall be regarded as a single writer member, and the vote or rejuest of the successors holding a majority interest shall be deemed to be the vote or request of such single writer member; in case no affirmative or negative vote or no request in case no affirmative or negative vote or no request is received from the successors holding a majority interest, such single writer member shall be disregarded for purposes of all votes or requests under this subsection.

(C) Each publisher member shall be given the option of electing to receive distribution on a current performance [fol. 979] basis as set forth in subsection (D) below and in Plan II of the "Publishers' Distribution Formula," which is attached hereto and marked "Attachment B," or on the basis of Plan I of such "Publishers' Distribution Formula." Failure to elect shall be deemed an election to receive distribution on the basis of Plan I. Election to receive distribution under Plan II must be made in writing and delivered to ASCAP not later than 30 days before the first day of any fiscal survey year and shall apply to distributions based on performance credits recorded during said fiscal survey year and subsequent years, except that an election applicable to the fiscal survey year starting October 1, 1959 may be made not later than 30 days after the effective date of this Order. Any publisher member who has elected to receive distribution under Plan I shall thereafter have the option of electing to receive distribution under Plan II by written notice delivered to ASCAP not later than 30 days before the first day of any fiscal survey year and said publisher member's distribution thereafter shall be based on performance credits recorded during the following fiscal survey year and subsequent years. New publisher members are to be given the option to make such election within 30 days after receiving notification of the acceptance of their membership applications.

(D) Any publisher member electing to receive distribution on a current performance basis shall receive distribution (based on the performance credits recorded during fiscal survey years following his election) equal to the following percentages of what such publisher would have received if all publisher distributions for the same survey period had been made on a current performance basis:

	Performances recorded during the fiscal survey year commencing October 1, 1959	75%
[foi	Performances recorded during the fiscal survey year commencing October 1, 1960	80%
[10.	Performances recorded during the fiscal survey year commencing October 1, 1961	85%
ų.	Performances recorded during the fiscal survey year commencing October 1, 1962	90%
	Performances recorded during the fiscal survey year commencing October 1, 1963	95%
9	Performances recorded during the fiscal survey year commencing October 1, 1964 and subse- quent years	100%

(E) As to the revenue received by ASCAP from foreign, sources, ASCAP shall make distribution to its writer and publisher members on a current performance basis. If the revenue from any source exceeds \$200,000 per annum and to the extent that the reports furnished to ASCAP by such source allocate credit in reasonably identifiable form separately by compositions performed and indicate the members in interest, such distribution shall be made on the basis of performances of the compositions of its members as reported by such foreign source; otherwise, such distribution shall be made on the basis of the most reliable information ASCAP has as to foreign performances generally.

- (F) ASCAP shall not promulgate any rules making distinctions as to the amount of credit given to various works or performances except as set forth in the "Weighting Rules" attached hereto and marked "Attachment C":
- (G) ASCAP shall grant no performance credits to any member for performances of compositions occurring after they are in the public domain, provided, however, that ASCAP may grant performance credits to either a publisher member or a writer member, or both, for performances of copyrighted arrangements of public domain works where the recipient of the performance credit holds a valid existing copyright covering said arrangement.

[fol. 981] IV

ASCAP shall carry out the provisions of subsections (A) and (B) of Section XIII of the Judgment concerning the number of votes which each member may cast for the election of directors, or for the amendment of the Society's Articles of Association, as follows:

- (A) If ASCAP chooses to weight the votes of its members it shall do so on the basis of the current performance credits received by each member in the latest available fiscal survey year preceding each election and in the manner set forth in subsection (B) below, with the proviso that no member shall have more than 100 votes. A member receiving no performance credits during the preceding fiscal survey year need not receive any votes whatsoever.
- (B) The votes of each member shall be calculated in accordance with the following formulae, subject to the limitation that no member shall have more than 100 votes:
 - (1) Writer Members: Each writer member who has received any performance credits in the latest available preceding fiscal survey year shall have one vote, plus (i) one vote for each 1,000 credits up to 20,000 credits, plus (ii) one vote for each 2,000 credits from 20,001 to 26,000 credits, plus (iii) one vote for each 3,000 credits from 26,001 to 35,000 credits, plus (iv) one vote for each 4,000 credits from 35.001 to 51,000 credits, plus

- (v) one vote for each 5,000 credits from 51,001 to 101,000, plus (vi) one vote for each 6,000 credits in excess of 101,000 credits.
- (2). Publisher Members: Each publisher member who has received any performance credits in the latest available preceding fiscal survey year shall have one vote, plus (i) one vote for each 4,000 credits up to 100,000 credits, plus (ii) one vote for each 8,000 credits, [fol. 982] from 100,001 credits to 140,000 credits, plus (iii) one vote for each 12,000 credits from 140,001 to 200,000 credits, plus (iv) one vote for each 16,000 credits from 200,001 to 408,000, plus (v) one vote for each 20,000 credits in excess of 408,000 credits.

The above formulae shall be kept current in the following manner. The number of writer and publisher performance credits respectively yielded by the ASCAP survey ended September 30, 1958 shall be calculated. This number shall be divided into the number of writer and publisher performance credits respectively yielded by the survey in the latest available fiscal survey year preceding the election in question. The resulting figures, rounded to the nearest tenth, for the writer members and publisher members respectively, shall be used as multipliers on each of the numbers above which is underlined.

- (C) If at any time there is an increase of more than 10% in the percentage of the total publisher votes represented by the ten publisher members and "groups of affiliated publisher members" (as that term is used in ASCAP's Articles of Association in force on the date of this Order) having the highest number of publisher votes, the weighting of votes as set forth in subsection (B) above shall be changed to bring such publishers within 10% of such percentage, in default of which the Court shall on application of the plaintiff make an appropriate order to accomplish that result.
- (D) In any election for the Board of Directors the nominees for directors shall include, in addition to those nominees chosen by any ASCAP committee or board, any per-

son eligible to be a director who is designated by a petition subscribed to by 25 or more of the members of ASCAP entitled to elect such director.

[fol. 983] (E) Any group of writer members entitled to cast one-twelfth of the votes of all ASCAP writer members, or any group of publisher members entitled to cast one-twelfth of the votes of all publisher members, shall be allowed to elect any eligible person a director by signing a petition and presenting such petition to ASCAP at least 90 days before the date of any scheduled election for the directors of the ASCAP Board. In such event, the number of directors to be elected in the general election shall be reduced by the number of directors so elected by petition, and all ASCAP members signing such petitions shall not be entitled to vote in the general election or to sign more than one petition in advance of any general election.

(F) An election of directors shall be held within one year after the effective date of this Order. All directors shall be elected at the same time and the number of directors shall not be less than 24.

V

Defendant ASCAP shall carry out the provisions of subsections (B), (C) and (D) of Section XIII of the Judgment, as follows:

- (A) Defendant ASCAP shall supply to each member a copy of this Order and attachments hereto together with any rule or regulation hereinafter promulgated which in any way affects the member's voting rights and rights in the ASCAP distribution.
 - (B) A list of all members and their mailing addresses snall be maintained and kept current by ASCAP and at the written request of any member, who has been a member for at least one year, shall be made available for inspection and copying during regular office hours by such member or any authorized representative of such member, [fol. 984] provided, however, that if any member instructs ASCAP in writing not to make his address available,

ASCAP shall not be required to permit inspection of such address but will forward to such member unopened any mail addressed to such member in care of ASCAP.

- (C) ASCAP shall within nine months after the end of each fiscal survey year prepare alphabetical lists of all compositions which received performance credits during said year, showing the number of credits received by each composition. In addition, ASCAP shall maintain records showing, for each composition which received performance credits as a theme or as background, cue or bridge; music during said fiscal survey year, the number of feature performance credits received by said composition during the preceding five fiscal survey years. Any member or his authorized agent may inspect such lists and records with respect to his own compositions, and other portions of such lists and records shall be available for further inspection by any member or his authorized agent to the extent that such inspection is sought in good faith in connection with any financial interest of such member as a member. All other records of the Society relating to the distribution by ASCAP to its members shall be open for inspection by any member or his authorized agent, for good cause, provided that such member shall have been a member of ASCAP for at least one year prior to his request for such inspection.
- (D) ASCAP shall, within six months after the entry of this Order, establish a special board, elected in the same manner as are the members of the Board of Directors, which shall have jurisdiction in the first instance over every complaint by a member relating to the distribution of ASCAP's revenues to such member or to any rule or regulation of the Society directly affecting the distribution of the Society's revenues to such member. Such complaint must be filed by the aggrieved member within nine months of the receipt by him of his annual statement or of the rule [fol. 985] or regulation on which such complaint is founded and the relief which the special board may grant in terms of monetary payment shall not extend back beyond the period of time covered by such annual statement, provided. however, that if the alleged injustice was such that the aggrieved party would not reasonably be put on notice of

it by his annual statement, the relief given my reach back as far as, in the opinion of the special board, is required to do justice to all parties. The special board shall set forth in detail its findings of fact and the grounds of its decision. Each member shall have a direct right of appeal from any decision made by such board to an impartial panel of the American Arbitration Association. In any appeal to such impartial panel from an adverse decision by such board, the appellant may seek to have the order. rule or regulation involved properly interpreted or applied, to have errors rectified, or to void such rule or regulation on grounds of its disériminatory or arbitrary character. Any additional amounts finally determined by the decision of such board (of, in the case of any appeal, by such panel) to be due to member with respect to the distribution complained of by such member and all subsequent distributions to the date of the decision shall be paid to the member promptly after the rendering of such decision.

(E) Stenographic transcripts of each proceeding before the special board shall at the request of any member besupplied by ASCAP at cost. If the Society itself requires or makes any use of the transcript, the member shall pay only the cost of making a second copy. ASCAP shall without cost make available to any member at his request copies of the final decisions of such board or panel, and periodically furnish summaries of all final decisions to all members.

VI

In regard to the provisions of Section XV of the Judgment:

[fol. 986] (A) In the event that any person whose application for membership has previously been denied between March 14, 1950 and the date of this Order shall within one year after the date of first publication pursuant to subsection (B) hereof request reconsideration of his application or shall submit a new application for membership, ASCAP shall reconsider such application and if, upon such reconsideration, ASCAP shall determine that such person meets the requirement set forth in Section XV of the Judgment,

ASCAP shall forthwith admit such person to membership, non-participating or otherwise, retroactively to the date of the original application or March 14, 1950, whichever is later, provided that (1) such person shall be found to have met the applicable requirements for memoership at the time of such original application and (2) such person shall not in the interim have granted to any other person or organization the right to-license public performances in the United States, of any of such person's copyrighted musical compositions upon which his qualification for membership is based.

- (B) Defendant ASCAP shall, in each year following the entry of this Order, issue a public statement and cause the same to be published on two separate occasions in *Variety* and *Billboard*, stating that it will accept as members all applicants meeting the requirements set forth in Section XV of the Judgment.
- (C) Where an applicant for membership meets the requirements set forth in Section XV of the Judgment, ASCAP shall not refuse membership to such applicant on the ground that the ASCAP survey has failed to record any performance of the applicant's works. Where an applicant fails to meet the requirements set forth in Section XV, ASCAP shall inform the applicant specifically wherein his application fails to meet said requirements and ASCAP shall not mention whether its survey has or has not failed to record any performances of the applicant's works unless the applicant has specifically requested said information.

[fol: 987] VII

(A) ASCAP is ordered and directed within three months after the entry of this Order to submit to its membership any portions of this Order as to which the consent of the membership is required by the Articles of Association of ASCAP, and the Board of Directors of ASCAP shall recommend to said members that said consent be given. If the required consent is given, within ten days thereafter ASCAP shall file with this Court a statement of that fact and the date of filing shall, be the effective date of this Order.

(B) This Order shall be vacated without prejudice to either party if within three months from the date of entry of this Order the required consent of the membership has not been obtained as to all matters as to which such consent is required by the Articles of Association of ASCAP.

Dated: January 7th, 1960.

Sylvester J. Ryan, United States District Judge.

[fol: 988] We hereby consent to the making and entry of the foregoing order.

For the plaintiff:

William D. Kilgore, Jr., Alfred Karsted, John L. Wilson, Richard B. O'Donnell, Walter K. Bennett, Attorneys for plaintiff.

For the defendants:

Arthur H. Dean, Howard T. Milman, Herman Finkelstein, Lloyd N. Cutler, Ferdinand Pecora, David H. Horowitz, Frederick A. Terry, Jr., Attorneys for defendants.

[fol. 989]

ATTACHMENT A

PART T

Plan I

The following rules shall govern any distribution under Plan I referred to in subsection (A) of Section III of the Order:

- (a) At least 20% of the funds distributed under such a plan shall be distributed on the basis of the individual writer member's current performance credits during the latest available preceding fiscal survey year.
- (b) At least 30% of the funds distributed under such a plan shall be distributed on the basis of the individual writer member's average performance credits during the latest available preceding five fiscal

survey years. ASCAP may, however, limit the rise in such payments for one year by not more than one-half of any increase for any writer member; ASCAP may limit any fall in such payments by assigning one-third of the fall in the first year, another third in the second year, and the remaining third in the third year, except that if a writer member's average performance points as calculated for October 1960 are less than his sustained performance points as calculated for October 1959, ASCAP may limit the applicable fall by assigning one-fourth of the fall in October 1960, another fourth in October 1961, another fourth in October 1962, and the remaining fourth in October 1963.

- (c) Not more than 30% of the funds distributed under any such plan may be distributed on the basis of the individual writer member's average performance [fol. 990] credits attributable to performances of his "recognized works" during the latest available preceding five fiscal survey years. A "recognized work" is a composition which has received performance credits in the ASCAP survey at least four quarters' prior to the quarter in which the performance occurs. ASCAP may limit the rise in such payments for one year by not more than one half of any increase for any writer member; ASCAP may limit any fall in such payments by assigning one third of the fall in the first year, another third in the second year, and the remaining third in the third year, except that if a writer member's 'recognized works performance points as calculated for October 1960 are less than his availability points as calculated for October 1959, ASCAP may limit the applicable fall by assigning one fourth of the fall in October 1960, another fourth in October 1961, another fourth in October 1962, and the remaining fourth in October 1963.
- (d) Not more than 20% of the funds distributed inder such a plan may be distributed on a basis of the individual writer member's five-year average performance credits multiplied by his length of membership.

in ASCAP. No writer member may be given credit for more than 42 years of membership.

(e) In computing the five-year averages called for in paragraphs (b) and (c) hereof, performance credits recorded during years when the member received payment on a current performance basis shall not be considered. In computing a member's length of membership in the Society for purposes of any payments made under the provisions of paragraph (d) hereof, the number of years during which the member received payment on a current performance basis shall be subtracted from the number of years he has actually been a member of the Society.

[fol. 991], (f) Paragraphs (b), (c) and (d) above need not apply to the not more than approximately 100 writer members with the highest five-year average performance credits in the Society referred to in subsection (B) of Section III of the Order. This exemption shall apply if the rules substituted therefor will have the effect of such writer members' receiving as a group substantially less money per performance credit than they would if paid on the basis of current performance credits.

[fol. 992]

PART II

Plan II: Current Performance Option

The following rules shall govern the current performance option referred to in subsection (A) of Section III of the Order:

(a) For any fiscal survey year covered by an election to receive distribution under the current performance option, an electing writer member shall receive, for his current performance credits up to 39,000 (or such higher number as ASCAP shall determine from time to time but not less than the five-year average performance credits of the writer member with the lowest such average of those writer members covered by subsection (B) of Section III of the Order) a distribution which

bears the same relationship to the total distributable writers' share of ASCAP's revenue as such performance credits in such fiscal survey year bear to the total performance credits of all ASCAP writer members for that year.

(b) For all credits in excess of such number of such writer member for such year, he shall receive distribution under the rules of Plan I described in Part I hereof, provided, however, that if an option to elect to receive distribution under this Plan II is not withheld pursuant to subsection (B) of Section III of the Order from the approximately 100 writer members with the highest five-year average performance credits, he shall receive the same distribution for each credit in excess of such number as he receives for each credit up to such number.

[fol. 993]. Part III

Before making the calculations referred to in Parts I and II above, ASCAP may first deduct an amount not exceeding 5% of the total distributable writers' share of ASCAP's revenue for the purpose of making special awards to writer members whose works have a unique prestige value for which adequate compensation would not otherwise be received by such writer members, and to writer members whose works are substantially performed in media not surveyed by ASCAP. 30 days prior to payment of any such awards, ASCAP shall send to all of its writer members a list of all recipients of such awards and the amount awarded to each.

PART IV

The Writers' Distribution Formula submitted herewith shall be deemed initially to comply with the provisions of Section III of the Order and this Attachment A, and may not be amended without 30 days' prior written notice to the plaintiff.

[fol. 994]

PUBLISHERS' DISTRIBUTION FORMULA

(Effective for distributions after September 30, 1960)

Plan I

The publishers' distributable revenue for each fiscal distribution year shall be computed for each calendar quarter and distributed quarterly. The total distributable revenue for the quarter (after deducting distributions to members exercising the current performance election provided in Plan II hereof) shall be divided into the three following funds:

- I. Current Performance Fund (55% of the total);
- II. Recognized Works Performance Fund (30% of the total);
- III. Membership Continuity Fund (15% of the total);

except that the percentage of distributable revenue in the Current Performance Fund shall increase as follows: For the four quarterly distributions beginning with the distribution in

October 1960 — 58%. October 1961 — 61% October 1962 — 64% October 1963 — 67% October 1964 — 70%

[fol. 995] and the percentage of distributable revenues in the Membership Continuity Fund shall decrease as follows: For the four quarterly distributions beginning with the distribution in

> October 1960 — ·12% October 1961 — 9% October 1962 — 6% October 1963 — 3% October 1964 — 0%

Each of the funds shall be distributed in accordance with the following rules:

I. Current Performance Fund ..

- (A) Distributions from this fund for each fiscal distribution year for this fund shall be made on the basis of performance credits recorded for the applicable fiscal survey year. During such fiscal distribution year, quarterly distributions on account shall be made based on the performance credits recorded for the quarters of such fiscal survey year for which computations are available. Such quarterly distributions on account shall be made and adjusted as provided below.
- (B) The distribution for the first quarter of the fiscal distribution year shall be computed by dividing the total distributable revenue for such quarter by the total performance credits received during the October-December quarter of the applicable fiscal survey year by publishers receiving distributions pursuant to this Plan I hereof, with the result being the value of a performance credit. Each publisher shall receive an amount equal to the number of performance [fol. 996] credits of such publisher in such October-December quarter, multiplied by the value of a performance credit.
- (C) The distribution for the second quarter of the fiscal distribution year shall be computed in the same manner, except that the computations shall be based on the cumulative six-month total distributable revenue for the first and second quarters and on the cumulative six-month performance credits for the October-December and January-March quarters of the applicable fiscal survey year, with the amount payable to each publisher to be adjusted by deducting the amount previously paid to such publisher on account for such fiscal distribution year.
- (D) The distribution for the third quarter shall be computed in the same manner, except that nine-month cumulative totals will be used.
- (E) The distribution for the fourth quarter shall be computed in the same manner, except that twelve-month cumulative totals will be used.

II. Recognized Works Performance Fund

- (A) Distribution to each publisher from this fund shall be based on the number of performance credits received by such publisher for performances of recognized works during the applicable fiscal survey year. "Recognized works" are defined as works which are performed at any time after the expiration of four quarters commencing with the quarter in which a performance of such work shall have first been recorded in the Society's survey.
- (B) The amount to be distributed to each publisher from the Recognized Works Performance Fund for any quarter shall be an amount equal to such publisher's performance credits attributable to performances of recognized works, [fol. 997] as calculated in accordance with the foregoing provisions, multiplied by the cash value of such a performance credit shall be computed by dividing the dollar amount of the Recognized Works Performance Fund for such quarter by the aggregate number of such performance eredits of all publishers receiving distribution pursuant to this Plan I hereof.

III. · Membership Continuity Fund

- (A) Distributions to each publisher from this fund shall be based upon the number of continuity points of such publisher, determined by multiplying (1) the number of quarters of such publisher's membership in the Society by (2) the performance credits received by such publisher during the applicable fiscal survey year.
- (B) The amount to be distributed to each publisher from the Membership Continuity Fund for any quarter shall be an amount equal to the continuity points of such publisher, multiplied by the cash value of a continuity point. The cash value of a continuity point shall be computed by dividing the dollar amount of the Membership Continuity Fund for such quarter by the aggregate number of continuity points of all publishers receiving distribution pursuant to this Plan I hereof.

PLAN II

Current Performance Election

In lieu of participating in the foregoing plan of publisher distribution, any publisher member may elect to receive distribution on a current performance basis. Any such election must be made in writing and delivered to ASCAP at least thirty days before the beginning of a fiscal survey year, and shall apply to all distributions [fol. 998] based upon performance credits recorded in such year and subsequent years, except that an election applicable to the fiscal survey year starting October 1, 1959 may be made not later than 30 days after the effective date of this Order, and except that an election by a new publisher member within 30 days after being notified of the accept ance of its membership application shall apply from the date it became a member.

An election covering the following years shall entitle the electing publisher member to the following distribution:

For the fiscal survey year starting:

Oct.	1,	1959	the	publisher	shall	receive	*******	75%
Oct.	1,	1960	the	publisher.	shall	receive	*******	80%
Oct.	1,	1961	the	publisher	shall	receive	*******	85%
Oct.	1,	1962	the	publisher	shall	receive		90%
· Oct.	1,	1963	the	publisher	shall	receive		95%
Oct.	1,	1964	and	thereafter	for s	ucceeding	g fis-	
			cal s	urvey year	s the p	ublisher	shall	
* .	*	. ,	recei	ve				100%

of what such publisher member would have received if all publisher distributions for that year had been made on a current performance basis.

A publisher member may make such election applicable beginning with the fiscal survey year starting October 1, 1959 or beginning with any subsequent fiscal survey year.

RESIGNING MEMBERS

(Applicable to both Plan I and Plan II)

If, in the case of a resigning publisher member, the Society shall continue to have the right to license the per-

forming rights in the United States to a work or works of [fol. 999] such publisher as a result of continued membership in the Society of one or more of the members in interest with respect to such work or works, and if no other performing rights licensing organization has any such right. distributions shall continue to be made to such resigning member subsequent to his resignation from the Society-for so long as the Society retains such licensing right, and no other performing rights licensing organization has any such right-on the basis of performance credits recorded for such work or works. The Society may require such resigning member to acknowledge that the Society retains such right and that no other performing rights licensing organization has any such right. In the event such resigning member fails so to acknowledge, such resigning member shall not be entitled to any payment pursuant to these pro-Anything to the contrary, notwithstanding, the Society may, at its option, deny resigning publisher members the right to receive payment on any basis other than a current performance basis as provided in Plan II above, provided that such option shall be exercised as to all resigning publisher members alike.

With respect to all other works of the resigning published member, distributions shall continue to be made to such resigning member subsequent to his resignation from the

Society on the following basis:

(1) An amount shall be calculated as to each of the three distribution funds (or pursuant to Plan II, if applicable) based on performance credits recorded for such works, such amount to be calculated in all respects in accordance with the provisions hereinbefore set forth;

(2) Such amount as to each fund (or computed pursuant to Plan II) shall be separated into two portions, the first of which shall bear the same ratio to the entire amount as the sum of radio and television revenues [fol. 1000] received by the Society bears to the aggregate of all revenues received by the Society during the preceding fiscal year, and the second of which shall bear the same ratio to the entire amount as the sum of reve-

nues received by the Society from sources other than radio and television bears to the aggregate of all revenues received by the Society during the preceding fiscal year;

- (3) The first portion shall, as to each fund (or as computed pursuant to Plan II), be distributed to such resigning member on the basis of performances made under radio and television licenses made prior to the resignation of such member;
- (4) The second portion shall, as to each fund (or as computed pursuant to Plan II), be distributed for four quarterly distributions after the resignation of such member (and not thereafter), the first such distribution to be equal to the full amount of such portion, the second such distribution to be equal to 75% of such portion, the third such distribution to be equal to 50% of such portion, and the fourth such distribution to be equal to 25% of such portion.

[fol. 1001]

ATTACHMENT C

WEIGHTING RULES

(Effective for performances after March 31, 1960)

In awarding credit for a performance appearing in the Society's survey, no distinction shall be made on the basis of the identity or use of the work performed, except as provided in these Weighting Rules.

- (A) As used in these Weighting Rules:
 - (1) "Theme" shall mean a musical work used as an identifying signature of a radio or television personality or of all or part of a radio or television program or series of programs. A musical work (other than a jingle) used in conjunction with a commercial announcement shall receive the same credit as a theme.
 - (2) "Background Music" shall mean mood, atmosphere or thematic music performed as background to some non-musical subject matter being presented on a radio or television program. A vocal or a visual in-

strumental rendition of a work on any medium shall not be regarded as background music regardless of the context in which performed.

- (3) "Jingle" shall mean a musical message containing commercial advertising matter, where (a) the musical material was originally written for commercial advertising purposes or (b) the performance is of a musical work, originally written for other purposes, with the lyrics changed for commercial advertising purposes with the permission of the ASCAP member or members in interest.
- (4) "Cue Music" shall mean music used on a radio or television program to introduce, but not to identify, a personality or event thereon. The term "cue music" [fol. 1002] includes, but is not limited to, introductions, "play-ons" and "play-offs".
- (5) "Bridge Music" shall mean music used on a radio or television program as a connective link between segments or portions thereof.
- (6) "Use" shall mean a performance of a composition reported by the ASCAP survey.
- (7) "Feature Performance" shall mean any performance other than as a theme, jingle, background music, or cue or bridge music.
- (8) "Performance Credit" shall mean the unit of measure of the results of the survey, being derived by multiplying uses or fractional uses by the applicable sampling and economic multipliers.
- (B) Each feature performance is to be awarded one use credit, except as provided herein and in subsections (D) and (E) hereof. Fractional use credit may be awarded to compositions performed as a theme or jingle or as background, cue or bridge music, or performances of copyrighted arrangements of works in the public domain.
 - (1) ASCAP may make distinctions in the amount of credit awarded to various works for similar uses when used as themes or as background, cue or bridge music,

provided that such distinctions shall be based solely on the number of feature performance credits received by the work prior to the fiscal survey year for which credit is to be awarded as provided in paragraph (3) below.

- (2) Such distinctions for similar uses as themes or cue or bridge music shall not be of a greater ratio than 10 to 1. In the case of background music, such distinction shall not be of a greater ratio than 5 to 1 between works qualifying under paragraph. (3) below and nonqualifying works which have been commercially pub-[fol. 1003] lished for general public distribution and ale, of which commercial recordings have been made as "singles" for general public distribution and sale, and five feature playings of which have been recorded in the ASCAP local radio sample survey during the five preceding fiscal survey years; other non-qualifying works when used as background music may be awarded credit on a durational basis as provided in paragraph (3) below. There shall be no distinction in the amount of credit for use of compositions as jingles.
- (3) Such distinctions shall be based upon compliance with both of the following tests for maximum credit (subject to the provisions of paragraph (5) below):
 - (a) a number of accumulated feature performance credits (not to exceed 20,000 credits since Janary 1, 1943 for a fully qualifying work), and
 - (b) a number of feature performance credits (not to exceed 2,500) in the five latest available preceding fiscal survey years, toward which there may be a limit of not more than 30% of such number of credits to be counted in any one year.

A work performed as a theme and which complies with the requirements of subparagraph (b) of this paragraph (3) shall receive 75%, 50% or 25% of such maximum credit if it has accumulated 75%, 50% or 25%, respectively, of the number of accumulated feature performance credits required by subparagraph (a)

of this paragraph (3). A work performed as background music and which complies with the requirements of said subparagraph (b) above shall receive 50% of such maximum credit if it has accumulated 50% of the number of accumulated feature performance credits required by said subparagraph (a) above. Background music on each program receiving credit on a dura-[fol. 1004] tional basis shall receive, for each three minutes' duration in the aggregate for that program, 20% of a use credit; fractions of three minutes shall be computed on the basis of 5% for each forty-five seconds or major fraction thereof.

(4) Until five years of records of feature performances are available, the number of feature performance credits required pursuant to subparagraph (b) of paragraph (3) above shall be reduced proportionately to the number of years available. For a work whose first surveyed performance occurred within the five latest available preceding fiscal survey years, the requirement of said subparagraph (b) shall be satisfied when the work has met the requirements of subparagraph (a) of paragraph (3) above and shall continue to be satisfied if in each subsequent year of such five years the work receives one-fifth the number of feature performance credits required by said subparagraph (b).

(5) ASCAP shall promulgate rules providing that:

- (a) Any work first performed before January 1, 1943 shall satisfy the requirements of subparagraph (a) of paragraph (3) above if the title of the work appears in the publication Variety Music Cavalcade, Prentice-Hall 1952, or among the top ten on the "Lucky Strike Hit Parade" or the top ten on the weekly list of the most popular songs published in Variety or Billboard.
- (b) If any work first performed on or after January 1, 1943 has received the number of performance credits required pursuant to subparagraph (a) of paragraph (3) above in the two consecutive fiscal

survey years commencing with the year in which its first performance is recorded in the survey, or if the title of such work appears in the publication [fol. 1005] Variety Music Cavalcade, Prentice-Hall 1952, or among the top ten on the "Lucky Strike Hit Parade" or the top ten on the weekly list of the most popular songs published in Variety or Billboard, there shall be a rebuttable presumption that such performance credits recorded before October 1, 1955 reflect feature performances; otherwise, the burden shall be on the member to establish that performance credits recorded before October 1, 1955 reflect feature performances.

- (C) The number of performance credits needed to meet any requirement pursuant to paragraph (3) above is premised on an annual total of approximately 25,000,000 performance credits recorded in the ASCAP survey; performance credits in years when the total number of performance credits recorded in the ASCAP survey was 20% greater or smaller than that number shall be adjusted proportionately.
- (D) ASCAP may promulgate rules limiting the credit to be awarded to multiple performances of the same work or aggregate performances of all works on a single program or during a period of programming or on a continuing series of the same program which is presented two or more times per week. ASCAP may make distinctions on the basis of the length of the performance or on whether it was a vocal or a visual instrumental performance.
- (E) Multiple use credits may be awarded for performances of works which require four minutes or more for a single, complete rendition thereof, and such credit may be limited to certain works, e.g., those which in their original form were composed for a choral, symphonic or similar concert performance (including chamber music). Performances of concerts by symphony orchestras on national radio network sustaining programs may be awarded [fol. 1006] credit equal to performances on a network of a specified number of stations (e.g., 50 stations). ASCAP

may also distribute to its members, for performances of their works in concert and symphony halls, amounts in excess of the license fees it receives from such licensees (e.g., five times said license fees).

(F) The Weighting Formula submitted herewith shall be deemed initially to comply with all of the provisions of the Order and this Attachment C, and may not be amended without 30 days' prior written notice to the plaintiff.

[fol. 1007] WRITERS' DISTRIBUTION FORMULA

(Effective for all distributions after September 30, 1960)

The writers' distributable revenues shall be computed for each calendar quarter, and distribution of such revenues shall be made during the month of January (or the preceding December), April, July or October, as the case may be, next following such calendar quarter. Such distribution shall be made by dividing the total distributable revenues for the quarter (after deducting distributions to members exercising the current performance election provided in Section VII hereof) into the following four funds:

- I. Current Performance Fund (20% of the total);
- II. Average Performance Fund (30% of the total);
- ·III. Recognized Works Performance Fund (30% of the total); and
- IV. Membership Continuity Fund (20% of the total); and by distributing each such fund in accordance with the following rules:

I. Current Performance Fund

(A) Distribution to each writer member (hereinafter called "writer") from this fund shall be based on the number of performance credits of such writer regorded during the latest annual period of October 1 through September 30 for which computations are available (such period being referred to in these rules as the "latest preceding fiscal survey year").

(B) The amount to be distributed to each writer shall be equal to the number of such performance credits of such writer, multiplied by the cash value of a performance credit. The cash value of a performance credit for [fol. 1008] any calendar quarter shall be computed by dividing the dollar amount of the Current Performance Fund for such quarter by the aggregate number of performance credits of all writers receiving distribution pursuant to Sections I through IV hereof.

II. Average Performance Fund

- (A) Distribution to each writer from this fund shall be based on the average performance credits of such writer, determined by aggregating all performance credits received by such writer during the five latest preceding fiscal survey years and dividing such aggregate by five.
- (B) In October of each year, each writer shall, for purposes of determining the distribution to be made to such writer from the Average Performance Fund during the year beginning with such October, be assigned a number of average performance points determined by dividing by 40 his average performance credits, as calculated pursuant to the preceding paragraph, provided that every writer having more than 38,999 average performance credits shall be assigned average performance points as follows:

	Cred	lits	* *	Points
from	39,000	to	49,999	97.5
44	50,000	64	62,499	1000
44	62,500	66	74,999	1025
44 .	75,000	.44	99,999	1050
44	100,000	ä	124,999	1075
44	125,000	44	199,999 .	1100
44	-200,000	. 66 ,	299,999	1200
66	300,000	44	449,999	1300
66	450,000	44	599,999	1400
over	600,000		. 11	1500

[fol. 1009] (C) (1) In the event that a writer's average performance points, as calculated for any particular October without regard to the provisions of this subsection (C), shall exceed such writer's average performance points as calculated for the preceding October without regard to the

provisions of this subsection (C), the point increase actually assigned to such member in the particular October shall be one-half of the point increase assignable without regard to the provisions of this subsection (C), and the remaining half of such point increase shall be assigned to such writer in the next succeeding October.

- (2) In the event that a writer's average performance points, as calculated for October 1960 without regard to the provisions of this subsection (C), shall be less than such writer's sustained performance points as calculated for October 1959, the point decrease actually assigned to such writer in October 1960 shall be one fourth of such difference, a second fourth of such difference shall be assigned to such writer in October 1961, a third fourth of such difference shall be assigned to such writer in October 1962 and the remaining fourth of such difference shall be assigned to such writer in October 1963. In the event that a writer's average performance points, as calculated for any particular October beginning with October 1961 without regard to the provisions of this subsection (C), shall be less than such writer's average performance points as calculated for the preceding October without regard to the provisions of this subsection (C), the point decrease actually assigned to such writer in the particular October shall be one third of such difference, a second third of such difference shall be assigned to such writer in the next succeeding October and the remaining third of such difference shall be assigned to such writer in the second succeeding October.
- (3) The provisions of this subsection shall be applied cumulatively.

[fol. 1010] (4) The provisions of this subsection (C) shall not be applied to limit increases or decreases in average performance points from the preceding October to the particular October where the increase is to Class 1000 or above, or where the decrease is from Class 1000 or above to Class 975. In the event that a writer's average performance points, as calculated without regard to the provisions of this subsection (C), would be decreased from Class 1000 or above to a class below 975, the provisions of this subsection (C) shall be applied to the point difference between Class 975 and the lower class to which such writer would be as-

signed if the provisions of this subsection (C) were disregarded.

(D) The amount to be distributed to each writer from the Average Performance Fund for any quarter shall be an amount equal to such writer's average performance points, as calculated in accordance with the foregoing provisions, multiplied by the cash value of an average performance point. The cash value of an average performance point shall be computed by dividing the dollar amount of the Average Performance Fund for such quarter by the aggregate number of average performance points of all writers receiving distribution pursuant to Sections I through IV hereof.

III. Recognized Works Performance Fund

Distribution to each writer from this fund shall be determined in all respects in the same manner as distributions from the Average Performance Fund, except that the calculation shall be based solely on performance credits of such writer attributable to performances of recognized works, and except that "recognized works performance points" and "availability points" shall be substituted for the terms "average performance points" and "sustained performance points" where applicable. "Recognized works" are defined as works which are performed at any time after [fol. 1011] the expiration of four quarters commencing with the quarter in which a performance of such work shall first have been recorded in the Society's survey.

IV. Membership Continuity Fund

- (A) Distribution to each writer from this fund shall be based upon the number of continuity points of such writer, determined by multiplying (1) the number of continuous quarters of such writer's membership in ASCAP, but in no event more than 168 quarters, and (2) such writer's average performance points.
- (B) The amount to be distributed to each writer from the Membership Continuity Fund for any calendar quarter shall be an amount equal to the continuity points of such

writer, multiplied by the cash value of a continuity point. The cash value of a continuity point shall be computed by dividing the dollar amount of the Membership Continuity Fund for such quarter by the aggregate number of continuity points of all writers receiving distribution pursuant to Sections I through IV hereof.

V. New Members

In the case of a new writer member of the Society, distribution shall be calculated in accordance with the foregoing rules or in accordance with Section VII hereof, whichever is applicable, except as hereinafter provided in this Section V:

- (A) For purposes of distributions to a new writer member there shall be included the two fiscal survey quarter years (plus any remaining fraction of a quarter year) prior to notification by the Society of the acceptance of his membership application to the extent that performances of his works are recorded in the Society's survey, but excluding [fol. 1012] works as to which, at the time of performance, any other performing rights organization had the right to license performances in the United States.
- (B) The Society may accelerate all or part of the distributions to a new writer member for performance credits received pursuant to subsection (A) above and performance credits recorded during his first two years of membership, provided that all new writer members are treated alike.
- (C) A new writer member's average performance and recognized works performance points shall be determined:
 - (1) For the first October in which the basis of computation of such points includes performance credits in a fiscal survey year including any part of the period of time referred to in subsection (A) above, by aggregating performance credits for that fiscal survey year and dividing by three.
 - (2) For the next succeeding October, by aggregating performance credits for the two latest preceding fiscal survey years and dividing by four.

- (3) For the next succeeding October, by aggregating performance credits for the three latest preceding fiscal survey years and dividing by five.
- (4) For the next succeeding October, by aggregating performance credits for the four latest preceding fiscal survey years and dividing by five.
- (5) For the next succeeding October, by aggregating performance credits for the five latest preceding fiscal survey years and dividing by five.

VI. Special Awards

Notwithstanding any of the foregoing provisions, in calculating the total distributable revenues to be placed in the [fol. 1013] four funds referred to in Sections I through IV above or distributed pursuant to Section VII below, there may first be deducted an amount not exceeding 5% of such revenues prior to such deduction, for the purpose of making special awards to writers whose works have a unique prestige value for which adequate compensation would not otherwise be received by such writers, and to writers whose works are performed substantially in media not surveyed by the Society? The distribution of such awards shall be determined by an independent panel appointed for that purpose by the writer members of the Board of Directors, and 30 days prior to payment pursuant to any such awards. the Society shall send to all of its writer members a list of all recipients of such awards and the amount awarded to each:

VII. Current Performance Election

A writer who, at the time, is below Class 975 in either the Average Performance Fund or the Recognized Works Performance Fund, may elect to receive distributions calculated in accordance with the following provisions:

(A) For any fiscal survey year covered by such election, an electing writer shall receive, for each current performance credit up to the number which is equal to the number of five-year average performance credits of the writer with

the lowest such average in Class 975 in the Average Performance Fund (hereafter called "the current performance election maximum"), an amount equal to the cash value of the total writers' distributable revenue divided by the total number of performance credits of all writer members during such year. (Any amounts distributed under this subsection shall be deducted before dividing the total writers' distributable revenue into the Current Performance, Average Performance, Recognized Works Performance, and Membership Continuity Funds.)

[fol. 1014] (B) If an electing writer receives in any fiscal survey year covered by such election more performance credits than "the current performance election maximum" he shall be paid for credits in excess thereof under Sections I through IV hereof, provided that in computing such payment:

- (1) the total number of current performance credits and credits attributable to recognized works recorded for such writer during such fiscal survey year shall be deemed to be his average performance credits and average recognized works performance credits, respectively, for purposes of determining his classifications in the Average Performance and Recognized Works Performance Funds; the provisions of subsection (C) of Section II shall be disregarded; and the resulting classifications shall be diminished by 975 points;
- (2) in determining the number of continuous quarters of such writer's membership in ASCAP for purposes of the Membership Continuity Fund, such writer shall be credited with no quarters of membership for any fiscal survey year covered by his election in which such writer receives not more performance credits than "the current performance election maximum".
- (C)(1) A writer who was below Class 975 in the Average Performance Fund when he elected and thereafter has more than 39,000 performance credits in any fiscal survey year, or a writer who was below Class 975 in the Recognized

Works Performance Fund when he elected and thereafter has more than 39,000 recognized works performance credits in any fiscal survey year, may (provided he gives notice to that effect within 3 months after he has been notified of the results of said fiscal survey year):

- (i) cancel such election and receive distribution starting retroactively for such fiscal survey year [fol. 1015] pursuant to Sections I through IV hereof, subject to the credit or debit that may be required by recomputation of such writer's distributable revenues, or
- (ii) cancel prospectively only, and thereafter receive distribution under Sections I through IV hereof, starting with the next succeeding fiscal survey years?
- (2) For purposes of classification under Sections II, III and IV hereof, any writer so cancelling such election shall have his performance credits, if any, for the years next prior to those covered by such election, credited as if they were received in the years next preceding such fiscal survey year.
- (3) If any writer so cancelling such election has never received distribution under Sections I through IV hereof, the provisions of Section V shall be applicable and, for the fiscal distribution year based on the fiscal survey year referred to in (i) or (ii) above, the provisions of subsection (C) of Section II shall be disregarded.
 - (4) For purposes of participation in the Membership Continuity Fund, the number of continuous quarters of such writer's membership shall be determined in accordance with paragraph (2) of subsection (B) above.
- (D). A writer previously in Class 975 or above in both the Average Performance Fund and the Recognized Works Performance Fund, who falls into a class below 975 in either fund in any fiscal survey year, may elect to receive

distribution calculated in accordance with subsections (A) and (B) above (provided he gives notice to that effect within 3 months after he has been notified of the results of the fiscal survey year in which he first fell below Class 975 in either fund), either

[fol. 1016] (1) Retroactively, starting with the fiscal survey year in which he first fell below Class 975 in either fund, subject to the credit or debit that may be required by recomputation of such writer's distributable revenues, or

- (2) Prospectively, starting with the next succeeding fiscal survey year.
- (E) An election under subsection (A) above must be made in writing and shall apply to distributions based on the fiscal survey years commencing no less than 30 days after said election (except that an election by a new writer member within 30 days after being notified of the acceptance of his membership application shall apply from the date he became a member) and thereafter until cancelled by notice in writing, such notice of cancellation (except. where cancellation is made under subsection (C) above) to be given not less than two years after the notice of his first such election and to be effective for distributions based on the fiscal survey years commencing at least 30 days thereafter. A writer electing and then cancelling, under either subsection (C) above or this subsection (E). and thereafter electing again within the next five years, may not cancel such election during the succeeding five years. The provisions of paragraph (2) of subsection (B) and paragraph (2) of subsection (C) shall be applicable to any writer cancelling an election pursuant to this subsection (E).

VIII. Resigning Members

(A) If, in the case of a resigning writer member, the Society shall continue to have the right to license the performing rights in the United States to a work or works of such writer as a result of continued membership in the

Society of one or more of the members in interest with respect to such work or works, and if no other performing [fol. 1017] rights licensing organization has any such right, distributions shall continue to be made to such resigning member subsequent to his resignation from the Society—for so long as the Society retains such licensing right, and no other performing rights licensing organization has any such right—on the basis of performance credits recorded for such work or works. The Society may require such resigning member to acknowledge that the Society retains such right and that no other performing rights licensing organization has any such right. In the event such resigning member fails so to acknowledge, such resigning member shall not be entitled to any payment pursuant to these provisions.

Anything to the contrary netwithstanding, the Society may, at its option, deny resigning writer members the right to receive payment on any basis other than a current performance basis as defined in Section VII above, provided that such option shall be exercised as to all resigning writer members alike.

- (B) With respect to all other works of the resigning writer member, distributions shall continue to be made to such resigning member subsequent to his resignation from the Society on the following basis:
 - (1) An amount shall be calculated as to each of the four distribution funds (or pursuant to Section VII) based on performance credits recorded for such works, such amount to be calculated in all respects in accordance with the provisions hereinbefore set forth;
 - (2) Such amount as to each fund (or calculated pursuant to Section VII) shall be separated into two portions, the first of which shall bear the same ratio to the entire amount as the revenues received by the Society from unexpired radio and television licenses made prior to the time of such member's resignation bears to the aggregate of all revenues received by the Society [fol. 1018] during the preceding fiscal year, and the second of which shall bear the same ratio to the entire

amount as the sum of revenues received by the Society from sources other than radio and television bears to the aggregate of all revenues received by the Society during the preceding fiscal year;

- (3) The first portion shall, as to each fund (or calculated pursuant to Section VII), be distributed to such resigning member on the basis of performances made under radio and television licenses made prior to the resignation of such member;
- (4) The second portion shall, as to each fund (or calculated pursuant to Section VII), be distributed for four quarterly distributions after the resignation of such member (and not thereafter), the first such distribution to be equal to the full amount of such portion, the second such distribution to be equal to 75% of such portion, the third such distribution to be equal to 50% of such portion, and the fourth such distribution to be equal to 25% of such portion.

[fol. 1019] WEIGHTING FORMULA

(Effective for performances after March 31, 1960)

In awarding credit for a performance appearing in the Society's survey, no distinction shall be made on the basis of the identity or use of the work performed, except as provided in this Weighting Formula.

(A) As used in this Weighting Formula:

- (1) "Theme" shall mean a musical work used as the identifying signature of a radio or television personality or of all or part of a radio or television program or series of programs. A musical work (other than a jingle) used in conjunction with a commercial announcement shall receive the same credit as a theme.
- (2) "Background Music" shall mean mood, atmosphere or thematic music performed as background to some non-musical subject matter being presented on a radio or television program. A vocal or a visual instrumental rendition of a work on any medium shall

not be regarded as background music regardless of the context in which performed.

- (3) "Jingle" shall mean a musical message containing commercial advertising matter, where (a) the musical material was originally written for commercial advertising purposes or (b) the performance is of a musical work, originally written for other purposes, with the lyrics changed for commercial advertising purposes with the permission of the ASCAP member or members in interest.
- (4) "Cue Music" shall mean music used on a radio or television program to introduce, but not to identify, a personality or event thereon. The term "cue muŝie" includes, but is not limited to, introductions, "playons", and "play-offs".
- [fol. 1020] (5) "Bridge Music" shall mean music used on a radio or television program as a connective link between segments or portions thereof.
- (6) "Qualifying Work" shall mean a work meeting both of the criteria set forth in subparagraphs (a)(i) and (a)(ii) of paragraph (C) of this Weighting Formula. A work meeting the criteria set forth in subparagraph (d) of said paragraph (C) shall also be deemed a qualifying work to the extent that it shall receive the percentage set forth in said subparagraph (d) of the use credit provided in this Weighting Formula for qualifying works.
- (7) "Non-Qualifying Work" shall mean a work no meeting the criteria set forth in paragraph (C) of this Weighting Formula.
- (8) "Single Program" shall mean any substantially consecutive period of broadcasting which is presented by the same dominant personality, or is presented under substantially the same title, or is presented as a single show with separate segments. It any such period of broadcasting is more than two hours in duration, each two-hour segment thereof shall be treated as a

single program, and any remaining fraction of less than two hours shall be treated as a single program.

- (9) "Use Credit" shall mean a full credit for a single performance.
- (10) "Otherwise Applicable Credit" shall mean the use credit or percentage of a use credit otherwise provided for in this Weighting Formula for a particular type of use of a qualifying or non-qualifying work.

(B) Credit for Feature Performances

- (1) Each feature performance of a work (as distinguished from performance as a theme or jingle or as background, cue or bridge music) shall receive one use [fol. 1021] credit for the first performance and 10% of a use credit for each subsequent performance on a single program, provided that no work shall receive more than two use credits for a single program.
- (2) In determining use credits for radio or television programs containing more than eight works per each quarter hour of programming (excluding themes, jingles, background, cue and bridge music), the use credit allotted to each work shall be reduced pro rata so that all works on the entire program shall receive in the aggregate the number of use credits which would have been allotted if the program had contained eight compositions per each quarter hour of programming (excluding themes, jingles, background, cue and bridge music).
- (C) Credit for Performances as a Theme, Background Music, or Cue or Bridge Music

(1) Qualifying Works:

(a) A work complying with both of the following tests shall receive the full use credit or percentage thereof specified in this Weighting Formula for the performance of a qualifying work as a theme, background music, or cue or bridge music:

- (i) an accumulation of 20,000 feature performance credits since January 1, 1943;
- (ii) an accumulation of 2500 feature performance credits during the five latest available preceding fiscal survey years, toward which total not more than 750 credits shall be counted for any one of such survey years.
- (b) Any work first performed before January 1, 1943 shall satisfy the requirements of subparagraph (a)(i) above, in the event such work has not accumulated 20,000 feature performance credits since such [fol. 1022] date, if the title of such work appears in the publication Variety Music Cavalcude, Prentice-Hall 1952, or among the top ten on the "Lucky Strike Hit Parade" or the top ten on the weekly list of the most popular songs published in Variety or Billboard.
- (c). If any work first performed on or after January 1, 1943 has earned the number of performance credits required pursuant to subparagraph (a)(i) above in the ·two consecutive fiscal survey years commencing with the year in which its first performance is recorded in the survey, or if the title of such work appears in the publication Variety Music Cavalcade, Prentice-Hall 1952, or among the top ten on the "Lucky Strike Hit Parade" or the top ten on the weekly list of the most popular songs published in Variety of Billboard, there shall be a rebuttable presumption that such performance credits recorded before October 1, 1955 reflect feature performances; otherwise, the burden shall be on the member or members in interest to establish that performance credits recorded before October 1.-1955 reflect feature performances.
- (d) A work performed as a theme and which complies with the requirements of subparagraph (a)(ii) above shall receive 75%, 50% or 25% of a full use credit if it has accumulated 15,000, 10,000 or 5,000 feature performance credits, respectively, since January 1, 1943. A work performed as background music and which complies with the requirements of subpara-

graph (a)(ii) above shall receive 50% of a full use credit if it has accumulated 10,000 feature performance credits since January 1, 1943.

- (e) Until five years of records of feature performances are available the number of feature performance credits required pursuant to subparagraph (a)(ii) above shall be reduced proportionately to the number of years available. For a work whose first surveyed [fol. 1023] performance occurred within the five latest available preceding fiscal survey years, the requirement of said subparagraph (a)(ii) shall be satisfied when the work has met the requirements of subparagraph (a)(i) above and shall continue to be satisfied if in each subsequent year of such five years the work receives one-fifth the number of feature performance credits required by said subparagraph (a)(ii).
- (f) The number of performance credits needed to meet any requirement pursuant to subparagraph (a) above is premised on an annual total of approximately 25,000,000 performance credits recorded in the ASCAP survey; performance credits in years when the total number of performance credits recorded in the ASCAP survey was 20% greater or smaller than that number shall be adjusted proportionately.

(2) Themes:

- (a) When any qualifying work is performed as a theme, it shall receive only one use credit for all such performances, within the first 60 minutes of any given two-hour period regardless of the number of actual such performances, and for all additional such performances during the second hour it shall receive only an addition 10% of a use credit regardless of the number of actual such performances.
- (b) When any non-qualifying work is performed as a theme, it shall receive only 10% of a use credit for all such performances within the first 60 minutes of any given two-hour period regardless of the number of actual such performances, and for all additional

such performances during the second hour it shall receive only an additional 1% of a use credit regardless of the number of actual such performances.

[fol. 1024] (e) When during any given two-hour period, any work is performed both

- (i) as a feature performance or as background music, and
 - (ii) as a theme,

it shall receive for its performance as a theme the percentage of use credit herein provided therefor, except that in no event shall the addition of such percentage of use credit increase the aggregate use credit for such work to more than 1-1/10 use credits for the first 60 minutes of such two-hour period, or to more than 10% of a use credit for the second hour.

(d) Anything to the contrary notwithstanding, if more than one work is performed as a theme during any quarter hour period, such works shall receive the following credit: The highest percentage of a use credit for any of such works for its performance as a theme during such period shall be shared among all such works, such sharing to be proportional to the relative percentage of a use credit which each such work would otherwise have received during that period.

(3) Background Music and Cue and Bridge Music:

- (a) When any qualifying work is performed as background music, it shall receive one use credit for the first such performance on a single program, and shall receive only 10% of a use credit for each subsequent such performance on such program, provided that no work shall receive more than two use credits for a single program.
- (b) Non-qualifying background music on each program shall receive, for each three minutes' duration in the aggregate for that program. 20% of a use credit; [fol. 1025] fractions of three minutes shall be com-

puted on the basis of 5% for each 45 seconds or major fraction thereof. To determine use credits for performances in this classification where the time of actual performance cannot be established from the information available to the Society, 40% of the net program time will be considered as containing background music and the computation of 20% will be based on such computed time. Where condensed versions of a longer program are presented and the actual music performed on this condensed version is unknown, the 40% computation will be made on the net program. time and applied pro rata to all of the background works in the longer version of the program. Anything to the contrary notwithstanding, any non-qualifying work which has been commercially published for general public distribution and sale, of which a commercial recording has been made as a "single" for general public distribution and sale, and five feature playings of which have been recorded in the Society's local radio sample survey during the five preceding fiscal survey years, shall receive not less than 20% of a use credit for the first performance as background music on a single program and 2% of a use credit for each subsequent such performance on such program, provided that no work shall receive credit for background use under this provision of more than 40% of a use credit for a single program.

- (c) If the aggregate use credit allotted to qualifying works and works described in the last sentence of subparagraph (3)(b) above performed as background music per each quarter hour of programming would exceed four use credits, the use credit allotted to each such work shall be reduced pro rata so that all such works performed as background [fol. 1026] music on the entire program shall receive an aggregate of four use credits per each quarter hour of programming.
- (d) When any qualifying work is performed as cue or bridge music, it shall receive only 10% of a use credit for all such performances within the first 69 minutes of any given two-hour period regardless

of the number of actual such performances, and for all additional such performances, during the second hour it shall receive only an additional 1% of a use credit regardless of the number of actual performances.

- (e) When any non-qualifying work is performed as cue or bridge music, it shall receive only 1% of a use credit for all such performances within the first 60 minutes of any given two-hour period regardless of the number of actual such performances, and for all additional such performances during the second hour it shall receive only an additional 10% of said-1% of a use credit regardless of the number of actual performances.
- (f) When during any given two-hour period, any work is performed both
 - (i) as a feature performance or as background music, and
 - (ii) for cues or bridges, it shall receive for all such cue and bridge performances regardless of number only 1% of a use credit.
- (g) Anything to the contrary notwithstanding, if more than one work is performed during any 15-minute period as cue or bridge music, they shall share the highest percentage of a use credit applicable to any work so performed as cue or bridge music, said [fol. 1027] sharing to be proportional to the relative percentage of a use credit which each work would otherwise have received as cue or bridge music during that period.
- (4) Jingles: When any work is performed as a jingle it shall receive only 1% of a use credit for all such performances within the first 60 minutes of any given two-hour period regardless of the number of actual such performances, and for all additional such performances during the second hour it shall receive only an additional 10% of 1% of a use credit regardless of the number of actual such performances.

- (5) General Limitation: Anything to the contrary notwithstanding, works performed on a dramatic program of 15 minutes or less, which is presented in serial form two or more times weekly (except feature performances), shall receive the following credits:
 - (a) If only one work is so performed, 5% of the otherwise applicable credit;
 - works shall collectively share the percentage of a use credit provided for in (a) above for the single work which would otherwise receive the highest percentage of a use credit, such sharing to be proportional to the relative percentages of a use credit which each such work would otherwise have received under (a) above during that period.

(D) Serious Works Four Minutes or Longer in Duration

Works which require four minutes or more for a single, complete rendition thereof, and which in their original form were composed for a choral, symphonic, or similar concert performance (including chamber music), shall receive credit [fol. 1028] on the following basis when performed for the respective designated periods of time:

Minutes of Actual Performance	The Otherwise Applicabl Credit Is Multiplied by:		
4:00 to 5:30	2		
5:31 to 10:30	. 5		
10:31 to 15:30	9		
15:31 to 20:30	14		
20:31 to 25:30	20		
25:31 to 30:30	28,		
30:31 to 35:30	.36		
35:31 to 40:30	44		
40:31 to 45:30.	52		
45:31 to 50:30 ·	60		
50:31 to 55:30	.68		
55:31 to 60:30	76		
Each additional			
5 minutes or			
part thereof	. 8		
	· · · · · · · · · · · · · · · · · · ·		

(E) Concert and Symphony Performances

The license fees which the Society receives from concert and symphony halls shall be multiplied by five in determining the credit to be awarded for performances of works in concert and symphony halls.

Performances on national radio network sustaining programs consisting of concerts by symphony orchestras which are presented as a genuine contribution to the culture of the nation shall be awarded credit equal to performances on a radio network of 50 stations.

[fol. 1029] (F). Copyrighted Arrangements

Except as hereinafter specifically provided, any arrangement of a work otherwise in the public domain which is separately published and separately copyrighted in the United States (or which, in the case of works described in paragraph 4 below, is available on rental) shall receive 10% of the otherwise applicable credit; if copyrighted as part of a compilation or folio, such an arrangement of a work otherwise in the public domain shall receive 2% of the otherwise applicable credit:

- (1) If a copyrighted arrangement has the same title as the underlying original composition but contains entirely new lyrics, it shall receive 35% of the otherwise applicable credit.
- (2) If a copyrighted arrangement has an entirely new title and contains entirely new lyrics, it shall receive 50% of the otherwise applicable credit.
- (3) If a copyrighted arrangement has an entirely new title and contains both entirely new lyrics and substantial new melodic material, it shall receive 75% to 100% of the otherwise applicable credit. All classifications pursuant to this paragraph shall be made by the Special Classification Committee for Public Domain Arrangements.
 - (4) If a copyrighted arrangement, as well as the original underlying composition, requires four minutes or more for a single complete rendition thereof, it shall

receive from 10% to 100% of the otherwise applicable credit, depending upon the extent to which it embodies new material. All classifications pursuant to this paragraph shall be made by the Special Classification Committee for Public Domain Arrangements.

[fol, 1030]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
Civil No. 13-95

UNITED STATES OF AMERICA, Plaintiff,

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, Defendant.

Notice of Appeal to the Supreme Court of the United States—Filed January 14, 1960

I. Notice is hereby given that Sam Fox Publishing Company, Inc., Movietone Music Corporation, Pleasant Music Publishing Corporation and Jefferson Music Company, Inc., applicants for intervention pursuant to Federal Rule of Civil Procedure 24(a)(2) in a proceeding in the above action commenced upon motion of the plaintiff for an order to further amend the Amended Final Judgment entered on March 14, 1950, hereby appeal to the Supreme Court of the United States from an order denying applicants' motion for leave to intervene entered in this action on November 16, 1959.

This appeal is taken pursuant to 15 U.S.C. § 29.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

- [fol. 1031] A. All docket entries commencing with June 29, 1959.
 - B. Complaint filed February 26, 1941.
 - C. Final Judgment entered March 4, 1941.
- D. Order directing that a hearing be held on October 19, 1959, entered June 29, 1959.
- E. Proposed Consent Further Amended Final Judgment, and proposed Writers' Distribution Plan and proposed Weighting Formula submitted therewith.
 - F. Amended Final Judgment entered March 14, 1950.
- G. Mailings to the membership of the American Society of Composers, Authors and Publishers dated July 10, 1959, July 21, 1959, August 26, 1959, September 4, 1959, October 5, 1959 and October 9, 1959, with proof of the service thereof.
- H. Plaintiff's Memorandum in Support of Proposed Consent Further Amended Final Judgment, filed September 2, 1959.
- I. Motion of applicants for leave to intervene, filed October 13, 1959, together with attached Pleading in Intervention and Memorandum in Support of Motion for Leave to Intervene Filed by Publisher Members of ASCAP, and proof of the service thereof.
- J. Staff Analysis of Proposed Consent Further Amended Final Judgment, dated October 9, 1959, submitted by the Staff of Subcommittee No. 5 of the Select Committee on Small Business of the House of Representatives.
- K. Memorandum on Behalf of Applicants for Leave to Intervene, filed October 19, 1959.
- [fol. 1032] L. Transcripts of the hearing on October 19 and 20, 1959.
- M. Exhibit G—Summary of ASCAP Balloting, dated January 7, 1960.
- N. Exhibit J-Tally Sheets of ASCAP Balloting, dated January 7, 1960.

- O. Transcripts of the hearing on January 6 and 7, 1960.
- P. Consent and Order on Issues of Fact or Law en Amended Final Judgment, entered January 7, 1960.
- Q. Order Adjudging that Article VII of the Proposed Consent Order Has Been Complied With and Effective Date of Said Consent Order is 1/7/60, entered January 7: 1960.
- R. Consent and Order Amending Proposed Further Amended Final Judgment attached to Show Cause Order dated 6/29/59, entered January 7, 1960.
 - S. This Notice of Appeal.
- III. The following questions are presented by this appeal:

In a proceeding brought by the United States to modify a judgment previously entered by consent in an action under the Sherman Act in order to strengthen parts of the judgment designed to protect the smaller members of an unincorporated association of music writers and publishers from unlawful injury by the dominating members of the association:

- (1) Were some of the smaller members of the association entitled to intervene in the proceeding under Federal Rule of Civil Procedure 24(a)(2) for the purpose of urging further changes in the judgment and [fol. 1033] in the proposed modification thereof, which were necessary for their adequate protection from the dominating members, upon the ground that their interest was inadequately represented by the existing parties to the proceeding—the Department of Justice and the association's Board of Directors—and that they would be bound as association members by any judgment entered in the proceeding?
- (2) Is the right of individual members of the association to inverted in the proceeding under Federal Rule 24(a)(2), on the ground that their interest is inadequately represented by the existing par-

ties and that they will be bound as association members by any judgment that is entered, dependent upon whether the association has been sued as an entity under Federal Rule 17(b) or in a class action under Federal Rule 23(a)(1)?

(3) Is the right of individual members of the association to intervene in the proceeding under Federal, Rule 24(a)(2) to urge further changes in the judy ment and in the proposed modification thereof barred because, although they are members of the association, they were not named parties to the original judgment that was entered in the antitrust suit by the United States?

Charles A. Horsky, Attorney for Applicants, Sam Fox Publishing Company, Inc., Movietone Music Corporation, Pleasant Music Publishing Corporation, Jefferson Music Company, Inc., 701 Union Trust Building, Washington 5, D. C.; Herbert Cheyette, 11 West 60th St., New York, N. Y. (GI 7-3890).

January 14, 1960.

[fol. 1034]

United States District Court
For the Southern District of New York
Civil No. 13-95

UNITED STATES OF AMERICA, Plaintiff,

V.

American Society of Composers, Authors, and Publishers, Defendant.

CERTIFICATE OF SERVICE

I, Charles A. Horsky, attorney for Sam Fox Publishing Company, Inc., Movietone Music Corporation, Pleasant Music Publishing Corporation and Jefferson Music Company, Inc., applicants for intervention herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of January, 1960, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto by mailing a copy in a duly addressed envelope, with postage prepaid, to their attorneys as follows:

1. On the United States-

Richard B. O'Donnell, Esq.
Attorney, Department of Justice
United States Courthouse
Foley Square
New York, New York

William D. Kilgore, Esq. Department of Justice Washington 25, D. C.

The Solicitor General Department of Justice Washington 25, D. C.

[fol. 1035] 2. On the American Society of Composers Authors and Publishers—

> Arthur H. Dean, Esq. 48 Wall Street New York, New York

Charles A. Horsky, Attorney for Applicants, Sam Fox Publishing Company, Inc., Movietone Musi Corporation, Pleasant Music Publishing Corporation, Jefferson Music Company, Inc., 70F Union Trust Building, Washington 5, D. C.; Herbert Cheyette, 11 West 60th St., New York, N. Y. (CI 7-3890). [fol. 1036]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER POSTPONING FURTHER CONSIDERATION OF QUESTION OF JURISDICTION-May 23, 1960

Appeal from the United States District Court for the Southern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

May 23, 1960

Mr. Justice Clark took no part in the consideration or decision of this case.

[fol. 1037]

SUPREME COURT OF THE UNITED STATES

No. 56-October Term, 1960

SAM FOX PUBLISHING COMPANY, INC., ET AL., Appellants,

V,

UNITED STATES AND AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, Appellees.

STIPULATION DISMISSING THE APPEAL AS TO APPELLANT MOVIE-TONE MUSIC CORPORATION—Filed July 1, 1960

Pursuant to the letter of Charles A. Horsky, Esq., to Howard T. Milman, Esq., dated June 24, 1960, the parties hereby stipulate that appellant Movietone Music Corporation is to be dismissed as an appellant in the above-named appeal.

Charles A. Hørsky, Attorney for Appellants.

Howard T. Milman, Attorney for Appellee, American Society of Composers, Authors and Publishers.

J. Lee Rankin, Solicitor General, Appellee, the United States of America, by the Solicitor General.

Dated: Jane 27, 1960.

1960—July 6. The foregoing stipulation to dismiss Movietone Music Corporation as a party appellant in the abovenamed appeal having been received and there being no fees due the Clerk, Movietone Music Corporation is now here dismissed as a party appellant, pursuant to the 60th Rule of this Court.

James R. Browning, Clerk of the Supreme Court of the United States, By R. J. Blanchard, Deputy.

(Seal)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

Sam For Publishing Company, Inc., et al.,
Appellants,

UNITED STATE AND AMERICAN SOCIETY OF COMPOSERS, AUTRORS AND PUBLISHERS, Appellees.

ON AFFE IV. FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

OPINION BELOW

The District Court for the Southern District of New York denied appellants' motion to intervene without a written opinion. The court's oral statements denying the motion are reported as part of the transcript of the proceeding of October 19, 1959 (R. 297).* These statements are reprinted as Appendix A to this Jurisdictional Statement (p. 1a), and the judgment of the court denying appellants' motion to intervene (R. 989) is reprinted as Appendix B (p. 4a):

JURISDICTION

A suit was brought against the defendant, American Society of Composers, Authors and Publishers (hereafter referred to as "ASCAP" or "the Society?"), by the United States on February 26, 1941, planging violations of Section 1 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. Section 1 (Sherman Act) (R. 4). On March 4, 1941, the District Court entered a final judgment by consent (R. 37). On March 14. 1950, the judgment was amended, again by consent (R. 106). Upon motion of plaintiff, the District Courts. on June 29, 1959, ordered that a hearing on a Proposed Consent Further Amended Final Judgment (hereafter referred to as "proposed order") be held on October 19, 1959, at which plaintiff and defendant were to show cause why the court should approve the proposed order (B. 48). The Discrict Court on that day denied appellants' motion to intervene in the proceeding, and its judgment to that effect was entered on November 16. 1959 (R: 306, 989). The notice of appeal to this Court was filed in the District Count on January 14. 1960 (R. 877). The jurisdiction of this Court to review by direct appeal the judgment of the District. Court

Record in United States v. American Society of Composers. Authors and Publishers, Civil No. 13-95, S.D.N.Y., which relate to appellants appeal from the denial of their motion to intervene, and which have been filed in this Court together with the Juris dictional Statement.

denying appellants' motion to intervene is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. Section 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989.

The following decisions sustain the jurisdiction of this Court to review by direct appeal the judgment of the court below denying appellants' motion to intervene: Brotherhood of Kailroad Trainmen v. Baltimore & Ohio R. R. Co., 331 U.S. 519, 524; Dickinson & Petroleum Conversion Corp., 338 U.S. 507, 513; Sutphen Estates v. United States, 342 U.S. 19.

STATUTES OR RULES INVOLVED

Federal Rule of Civil Procedure 24 reads in relevant part:

- "(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought . . ."

QUESTIONS PRESENTED

The following questions are presented by this appeal:
In a proceeding brought by the United States to modify a judgment previously entered by consent in an action under the Sherman Acts in order to strengthen parts of the judgment designed to protect the smaller members of an unincorporated association

of music writers and publishers from unlawful injury by the dominating members of the association:

- (1) Were some of the smaller members of the association entitled to intervene in the proceeding under Federal Rule of Civil Procedure 24(a)(2) for the purpose of urging changes in the proposed modification of the judgment, which were necessary for their protection from the dominating members, upon the ground that their interest was inadequately represented by the existing particion the proceeding—the Department of Justice and the association's Board of Directors—and that they would be bound as association members by any judgment entered in the proceeding?
 - (2) Is the right of individual members of the association to move to intervene in the proceeding under Federal Rule 24(a)(2), on the ground that their interest is inadequately represented by the existing parties and that they will be bound as association members by any judgment that is entered, dependent upon whether the association has been sued as an entity under Federal Rule 17(b) or in a class action under Federal Rule 23(a)(1)?
- (3) Is the right of individual members of the association to intervene in the proceeding under Federal Rule 24(a)(2) to urge changes in the proposed modification of the judgment barred because, although they are members of the association, they were not named parties to the original judgment that was entered in the antitrust suit by the United States?

STATEMENT

The current proceeding of which appellants sought to intervene marks the most recent development in an antitrust suit commenced by the United States against ASCAP in the court below on February 26, 1941. For an understanding of this latest proceeding, and of the nature and purpose of appellants' motion to intervene, it is necessary to recount briefly the prior events in the suit.

ASCAP, an unincorporated association, is a performing rights licensing society. The Society's revenues are derived from royalties paid to it by those whom it has liegased to perform publicly the copygighted musical works composed or published by ASCAP members, the royalties received being there, after distributed to the members. From the autset. the action by the United States against the Society has been concerned with alleged violations of the antitrust laws involved in two major aspects of ASCAP's operations! (1) ASGAP's relations with the persons to A hom it licenses the right to perform the unisical works of its members and (2) ASCAD's internal arrangements with regard to the distribution of roralties to its publisher, and writer members, and the exercise of control within the Society through the distribution of voting power amongs the members. Only the latter aspect of ASCAP's operations was involved in the current proceeding in the court below,

The alleged violations of the antitrust laws arising from interference by the Society with the competitive relations of its members inter sesse are plainly expressed in the complaint. Paragraph 15(A), for example, alleges that as part of a conspiracy and combination to restrain trade and commerce in various types

among other things, had undertaken to create the Society as an "instrumentality with a self-perpetuating Board of Directors and to vest in the twenty-four persons constituting such board the exclusive power to control the activities" of ASCAP (R, 10-11). The prayer for relief requests that the Society and its officers, agents and members be restrained from (1) electing the directors other than by a vote in which all ASCAP members would have the right to vote for their respective representatives and (1) from distributing royalties received on performances of the works of its members other than on a prescribed basis (R. 26).

On March 4, 1941, less than a week after the complaint had been filed, a judgment by consent was entered (R. 37). Limitations were imposed on the voting and other control exercised in the Society by a dominating group of publisher members who controlled the Society's Board of Directors** and changes were made in the inequitable system by which the Directors distributed royalties among the ASCAP members (R.

The Society itself and certain of its officers were named as defendants. The latter were charged as defendants in their own right and as representatives of all, the Society's members, who were alleged to "constitute a group so numerous that it would be impractical to bring all of them on before the Court by name" (R. 4-5). See pp. 26-28 below.

ASCAP's Board of 24 directors is in effect two co-existing Boards; one consists of 12 publishers who supervise publisher revenue distributions, and the other of 12 writers who supervise writer distributions. Because of the economics of the music industry, the publisher members of the Board dominate the writer Board members. See pp. 23-24 of plaintiff's Memorandum of Septimber 2, 1959, submitted in the proceeding below in support of the proposed order (R. 165-166)

45.46). These (as well as other provisions of the 1941 judgment) were found to be inadequate, however, and on March 14, 1950, an Amended Final Judgment was entered, again by consent (R. 106). Article XVII of this 1950 judgment, however, expressly reserved to the United States the right to apply to the court, at any time after five years from the date of its entry. "for the vacation of sald Judgment, or its modification in any respect" (R. 123). Article XIII, which dealt especially with voting and grievance procedures within the Society, stated explicitly that one of the artitrust purposes of the suit was "to insure a democratic administration of the affairs of defendant ASCAP." (R. 119).

It shortly became clear that the 1950 judgment was also inadequate to protect the competitive position of the smaller members of ASCAP against the dominating publisher members; who continued to control the Society's operations through their representatives on the Board of Directors, and that it would be necessary to modify the judgment substantially if the antitrust purpose of the suit against ASCAP was to be achieved. Complaints from various members led the Department of Justice in 1956 to institute an investigation of the internal operations of ASCAP under the 1950 judgment. Further information was disclosed in extensive hearings conducted in 1958 by a committee of Congress on the 'Policies of ASCAP.'.*

^{*}Hearings before Subcommittee No. 5, Select Committee on Small Business, House of Representatives, 85th Cong., A Sess. pursuant in HR Res. 56 (March, April 1958) (hereafter referred to as SCAP Hearings). The report of the Committee is HLR Rep. 1710, 85th Cong., 2d Sess. (1958) (hereafter referred to as Hearing Report).

Rather than making application to the court below to modify the judgment pursuant to Article XVII, the Department of Justice entered into negotiations with ASCAP, through the Society's Board of Directors, and agreed with the Directors upon a proposed order amending the 1950 judgment. The proposed amendments dealt with the following areas of ASCAP's internal operations:

- 1. The right of ASCAP members to withdraw from ASCAP.
- 2. The requirement that ASCAP scientifically conduct a survey of the performances of the compositions of its members as a basis upon which to make distribution of its revenues to its members.
- 3. The manner in which ASCAP shall make distribution of such revenues to its members.
- 4. The limitation on the extent to which ASCAP may weight the votes of its members.
- 5. The manner in which ASCAP shall assure its members of equal treatment and an adequate opportunity to protect their rights within ASCAP; and
- 6. The obligation upon ASCAP to admit all duly qualified applicants to membership.

Upon motion of the Department of Justice, the court below on June 29, 1959, ordered that a hearing on the amendments be held on October 19, 1959, at which the Department and ASCAP were to show cause why the proposed order should be approved. The court's order further directed that:

"any party or individual who has an interest affected by these proceedings may appear at such hearing and make application to be heard upon

the ground that the [proposed order] will not accomplish the antitrust purpose of this suit" (R. 48).

Having been informed that the District Court's order of June 29 would permit ASCAP members other than the Board of Directors to participate in the October 19 proceeding only as amici cariae, appellants, each of whom is a publisher member of the Society, moved pursuant to Federal Rule 24(a)(2) to intervene in the proceeding in order to present proof that the proposed order would not "accomplish the antitrust purpose of this suit", and to urge changes in the proposed order which they considered necessary to protect them and other ASCAP members from the dominating publisher members (R. 173).

In support of their motion to intervene, appellants undertook to establish, pursuant to Federal Rule 21(a)(2), that neither the Society's Board of Directors a nor the Department of Justice adequately represented their interest in the proceeding as ASCAP members and that they would be bound by the District Court's approval of the proposed order. Appellants asserted. and offered to prove, that the Board of Directors, who had negotiated the proposed order with the Department of Justice, was comprised of representatives of the dominating publisher members and other publishers associated with them by business dealings or ownership interest (affiliates). The domination of the Society's affairs by these publishers, to the detriment of the competitive position of its smaller members such as appellants, had made necessary the original 1941. indement, its strengthening in, 1950, and now the further amendments, being proposed (Re. 192-198;

242-245). For this reason, appellants maintained, the Directors' interests were exactly antagonistic to theirs, and hence the Directors could not adequately represent, appellants' interest in securific protection from the dominating publisher members of the Society:

In showing that the Department of Justice inadequately represented their interest, appellants analyzed the provisions of the proposed order and pointed out that it effected no substantial change in the existing. undesirable situation in the Society with respect to voting control and the distribution of royalties to the members (R. 209/215; 245-293). Appellants set forth their views in a Pleading in Intervention filed. pursuant to Bederal Rule 24(c) (R. 175) and in detailed supporting memoranda containing further offers of proof. . .

Appellants proposed to prove, inter alia, that the voting provisions of the order (Section IV) left the dominating publisher members of the Society with more than 41 per cent of the total vote of the. publisher members and almost 50 per cent of the publisher member vote which had been in the past. on the average, actually east and treated as valid in ASCAP elections (R. 245-261). They likewise offered to prove that Section II of the proposed order, dealing. with the ASCAP survey of public performances of music which supplies the information that is the basis. for distributions of revenues to the Society's members. failed in any substantial way to require a more accurate

See ASCAP Hearings, pp 74 52, 214-215; Hearing Report . W. Plaintill's M. Annulom of Som g. 1969, vo. 2321 R. 1815. 166

[&]quot; See n. " p. 6 phove

and reliable means of securing such information. Particularly was this so because the proposed order still permitted information as to whether and under what circumstances music had been performed to be collected by personnel who were controlled by the dominating publishers through their representatives on the Board of Directors (R. 262-276). Further, appellants offered to prove that the formula adopted by Section III(F) for distributing royalty revenues to ASCAP members gave arbitrary preference largely to the works of the dominating publishers (Rf277-293) Appellants urged that the acceptance by the Department of amendments such as these to the 1950 jung ment effected and perpetuated fundamental inequities. · in the competitive relations of ASCAP's members with one another, and conclusively established that the Department inadequately represented appellants interest in securing protection from the dominating members of the Society.

Appellants further maintained that, as was quite clear, they would be bound as members of the Society by any modification of the 1950 judgment the

court would approve.

The District Court summarily, and without findings or opinion, denied appellants motion to intervene at the opening of the October 19 proceeding (R. 303-306; App. A. pp. Ia-Zal, and permitted them to appear only as amici cariae. During the course of the projectedings, however, the court stated three grounds on which it had denied the motion:

⁽a) that appellants were represented by the Society's Board of Directors with their consent. because they were members:

- (b) that appollants were not named parties to the antitrust suit against ASCAP and the suit had proceeded to a consent judgment;
- (a) that appellants' interest was represented by the Government in the person of the Attorney General (R. 463 465; App. A, pp. 2a-3a; App. B, pp. 4a-5a).

After hearing Department of Justice attorneys and counsel retained by the Directors, and after hearing amici cariae, including appellants, the court below ordered that a vote of the members of ASCAP be taken to determine whether or not they approved the proposed order (R. 640, 650.653). The Society was directed to conduct a numerical batlot in which each member would exercise one vote as well as a ballot reflecting the weighted vote of the members, to be determined by the amount of royalty revenues each received (R. 659-660).

The membership vote' was held and the results announced at a further proceeding before the court on January 6 and 7, 1960. Of 1692 publisher members who east valid ballots, 440, or more than 40 per cent, voted against the proposed order; of 4262 writer members whoseast valid ballots, 1285, or slightly more than 30 per cent, voted against the order (R. 676, 4154). The proposed order, moreover, secured the approval of only slightly more than a majority, 56 per cent, of all the ASCAP members who were eligible to vote, and less than a majority, 47.7 per cent, of all the publisher members eligible to vote (R. 750-751).

The timers are all small is follows 5.002 arrives and 1.365 and 5.465 are figured for 0.17 ASCAP members. Were eligible to date. The number of wires and of 1.265 are found for a large of members are first or the primer and 3.200 at 2.25 are found of the 6.457 are deep algebra or value. The number of probability numbers value to approve the proposal order was a 2.25 at 1.55 per cent of the 1.365 publishers clubble to value.

At the close of the proceeding of January 7, the District Court approved the proposed order (B. 813, 810).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

. The basic question which is appropriate for conselecation by this Court is whether appellants' constentions with regard to the provisions of the proposed order amending the 1950 indement establish their right to intervene in the proceeding below, pursuant to Federal Rule 24(a)(2). Cf. Sutplien Estates N. United States, 342 U.S. 19. No issues of fact are involved in this appeal, since no evidence was received or testimony taken by the court below in connection with appellants' mation to interverse. Thi denving the morion, the court had before it only the proposed order. a memorandum of facts and arguments in support of the proposed order submitted by the Department of histice, the motion itself, appellants' Pleading in Intercention, there supporting memoranda of October 13 and October 19, and opposing memoranda submitted on the latter date by the Department of Justice and be equisel returned by the Mirectors of the Society; . We believe that the demal of appellants' motion raises' stantial questions in the application of Rule 24. 35(2), particularly in antitrust proceedings brought to the United States, which warrant plenary consid " alson by this Court.

Intervention under Rule 24(a) (2) contemplates a starting in which two conditions exist: (a) the rependantion of the applicant's inaccest to existing arties is or may be inadequate", and (b) "the applicant is or may be bound by a judgment mathe action". The District Court's statement of its reasons for denying appellants' motion can be subsumed under these two enterprises and we deal with him in that order.

- A. Representation of appellants' interest by the existing parties is or may be inadequate
- A. The court below phrased its conclusion that appellants were adequately represented by the Society in various ways. It first stated that because appellants were members of the Society, they had "therefore surrendered [their | right to intervene as individuals", (R. 304; App. A. pp. 1a-2a). Later it restated this ruling as follows (R. 464; App. A. p. 3a):

"I denied you the right to intervene first, because you were represented by the Society, and by the Society with your consent, you having become a member of it."

The court's statement is at odds with a long line of decisions which grant to a member of a group which is a party to a suit the right to intervene to protect Itis interest when it will not be protected by those who would normally be expected to do so. E.g., Park de Tilford, Inc. v. Schulte, 160 F.2d 984, 988,989 (2d Cir. 1947), certiorari denied 332 U.S. 761; Pyle-National Co., v. Amos, 172, F.2d, 125, 427, 428 ; 7th Cir., 1949 ::-Pellegrino v. Neshit, 203 F.24 463 79th Cir. 1953). Apparently, the court below would leave open to an ASCAP member who is aggrieved by the Directors' representation of his interest only the path of resigning from the Society. Not only does the law not compet such a choice but, as the court below usust have been aware; resignation of in fact impossible for any ASCAP member who hopes to continue to earn his livelihood as a music writer or publisher. Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888, 891 (S.D. N.Y. 1948); BMI v. Taylor, 55 N.Y.S. 2d 94, 100 (Sup. Ct. 1945). See Finkelstein, The Composer and the Public Interest

* Weadation of Perturning Rights Licensing Societies, 19 Law & Cont. Prob. 275-278, 284 (1954).

Moreover, there emmet be even the slightest doubt fint the Soziety's Directors are unable to represent appellants' interest in securing protection from unlawful competitive injury by the dominating publisher members. The control of the Board of Directors by the dominating publishers and the anticompetitive efforts of that control on the small members of ASCAP such as appellants formed the basis for one of the : charges in the 1941 complaint, and was the subject of several portions of the 1941 and 1950 judgments. These yery same grounds were, in fact, advanced to justify the proposed further amendments that gave rise to the proceeding in the court below. The memorandom filed by the Department of Justice in support of the approposed amendments acknowledged that the downating publisher members control the Society's Beard of Directors. See Memorandum of September 2, 1959, at p. 23 (R. 166). The Board therefore has interests which are squarely and necessarily in conflict with those of aprellants and other smaller ASCAP members, Indeed, sworn testimony in the hearings before a committee of Congress disclosed numerous examples of the use by the Directors of their absolute power over the distribution of ASCAP's revenues to further the competitive interest of the dominating publishers to the defriment of the Society's other mem-This slight concessions to the interests of the

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smaller members of ASCAP which were wrung from the dominating publishers in the proposed order cannot mask their continued interest in retaining, at the expense of the other members, as much control as possible over the Society's affairs. Plainly, appellants' requested intervention should not have been denied on the ground that "the Society" adequately represented their interest.

2. Nor can it be said that appellants' interest was adequately represented by the Department of Justice. No doubt the Department represents the public interest in antitrust suits brought by the United States, and no doubt such representation in the suit against ASCAP was intended to challenge, on behalf of the members of the Society, the unlawful competitive injuries inflicted on those members by the dominating publishers. But this statement of general principle should not be permitted to obscure the realities of this. particular antitrust suit. The proof which appellants were denied the opportunity to adduce-indeed, the facts which the Department itself represented to the court-made it plain that the Department, in the agreement which it had reached with the very dominating members whom it charged with inflicting the illegal competitive injury, embraced a proposal which will surely not eliminate or, in any substantial way, reduce the control of the dominating members over the affairs of ASCAP.

Within the confines of this Statement it is possible to indicate only briefly and summarily the respects in which the Department of Justice, in agreeing with the Directors of the Society to the proposed order, inadequately represented appellants interests.* Per-

^{*}A more complete discussion appears, in appellants memorandum filed with the District Court on October 19, 1959 (R. 226).

haps the most disturbing aspect of the Department's agreement, however, is evidenced by Section IV of the proposed order. This section continues the weighted voting system permitted by the 1950 judgment in a manner which ensures that the dominating publishers and their affiliated members will retain the same control of ASCAP's affairs as they have had in the past. Addressing the ASCAP membership in support of the order, counsel retained by the Directors to represent the Society acknowledged that Ainder the proposed order ten of the Society's dominating publisher members, the ten top, publishers (and their affiliates), would initially be able to exercise approximately 41 per cent of the total publisher vote (R. 135, p. 34; 136, p. 36).* Appellants offered to prove, moreover, far more significant facts-first; that a comparison of the number of actual votes iu ASCAP elections of recent years with the total eligible vote shows that 41 per cent of the total publisher vote actually constitutes almost 50 per cent of the average vote that was cast and treated as valid. and further that the votes of publishers other than the dominating publishers are so widely dispersed that the dominating members would certainly retain voting centrol and thereby continue to conduct the Society's

It is appropriate to point out that the duly figures reflecting be distribution of voting power in the Society which would result a der the proposed order are these found in the August 27 speech to coinsel for the Society, which were supplied by the Directors. Despite the fact that Article XVI of the 1950 judgment authorizes the Distribution of Justice to inspect ASCAP's books and records R 122V, the Department offered in independent information of its own to the District Court as to the practical effect of the voting provisions of the proposed order.

affairs to the competitive disadvantage of its other members (R. 250-254).*

The acquiescence by the Department to this Section IV cannot be said to represent the interest of appellants in securing a decree which will, as set forth in Article XIII of the 1950 judgment, "insure a democratic administration of the affairs of defendant ASCAP" (R. 119). The court below, however, in its preoccupation with the question whether the proposed order would work any "improvement" in the situation, appears to have concluded that "improvements", rather than "a democratic administration", marked the limits of appellants' legitimate interest (R. 450-451; see also, e.g., R. 459, 474, 568, 761).

A further glaring inadequacy in the Department's representation of appellants' interest is reflected in Section II of the proposed order, which deals with ASCAP's survey of performances of its members works. This survey consists of two distinct operations; first, the collection and collation of information concerning the performances surveyed; second, the application of various mathematical and statistical computations to this information. Section II of the proposed order undertakes only to make the mathematical computations applied in the survey more accurate. It makes no mention of, and does nothing to correct, the

It is too clear for any serious controversy that, under the actitrust laws and other federal statutes, such a concentration of voring power is considered more than succeint to control the operations of a large business organization in which the other voting power is widely dispersed. Cf. United States v. Union Pacific R.R., 226 U.S. 61; North American Co. v. Securities a Exchange Commission, 327 U.S. 686, 692-693, 697; Morgan Starley & Co. v. Securities & Exchange Commission, 126 F.2d 325, 328 (2d Cir. 1942); United States v. Scars, Rochuck & Co., 165 F. Supp. 356, 359 (S.D. N.Y. 1958)

method by which the survey information is originally collected.

Appellants sought to bring before the court evidence such as that addited in the ASCAP Hearings before a committee of Congress, which disclosed that the entire method by which ASCAP collects its survey information is inaccurate and unreliable.* The same procedure, however, will continue under the proposed order. The personnel conducting the survey will continue to operate on the ASCAP premises under the supervision of the Directors, who are controlled by the dominating publisher members who may directly benefit from the manner in which the supervision is exercised. Obviously, if the original information which is fed to the survey sample is, inaccurate, the most accurate mathematical formula devised can do nothing but compound error.

Moreover, the proposed order permits the Directors to make verbal and subjective interpretations of the formulae which determine the distribution of royalty revenues to the Society's members comparable to those made under the 1950 judgment. These interespectations will, among other things, affect the weight is be given to a particular performance of a work that is picked up in the survey, and will be made independently of the application of the statistical sampling formula itself. The Directors will thus retain their ability to influence the basic performance data that comprise the source information to which the survey formula is to be applied, and thereby to influence the royalty payments members receive (R. 262-276). A more direct conflict of interest

E a. ASCAP Hearings, pp. 70, 84, 429-441, 444. Ser Plain Us Memographym of September 2, 1959, p. 4 (R. 146)

affecting those whose positions make them in effect trustees of the funds collected for all ASCAP members would be hard to imagine. In fact, as appellants proposed to show, an accurate, fair and impartial survey could be secured only through the use of an independent survey organization which would insulate the system from any possibility of influence or control by any ASCAP member (R. 274; 474-477).

These inadequagies in the proposed order, and other similar features which need not now be detailed, taken together with appellants' status as members of the Society whom the Bepartment had undertaken to protect, fully warranted appellants' requested intervention. This Court has in the past permitted intervention in litigation in which a governmental agency purported to, but in actuality did not; represent the interest of a private party seeking to intervene: Kaufmen v. Societe Internationale, 343. U.S. 156, 161-162. One of the courts of appeals has also so ruled. Textile Workers Union of America v. Allendale Co., 226 F.2d 765 (D.C. Cir. 1955), certiorari denied; 351 U.S. 909. and Wolpe v. Poretsky, 144 F.2d 505 (D.C. Uir, 1944). certiorari denied, 323, U.S. 777. Moreover, decisions allowing intervention although a governmental agency is already a party are not whique to fields other than that of antitrust law. Intervention has been authorized in a Government autitrust suit by a private party whose existing rights against the defendant could not later be enforced if a decree proposal by the Government were entered. builted States v. Terminal R. R. Assa. of St. Louis, 236 U.S. 194, 199. Seconso United States v. Reading Co., 273 Fed 848, 849-850, 855-856 (E.D. Pa. 1921), modified and affirmed sub nom, Continental Insurance Co. v. I nited States, 259 U.S. 156.

Appellants have been mable to discover any prog eceding in which intervention was denied where the status of the party seeking infervention and the inadeglacy of the Department's representation of his interest was at all comparable to the circumstances of this litigation. Appellants are not merely customers, licensees or competitors of the antitrust defendant who, in such cases as United States v. General Electric, 95 F. Supp. 165 (D. N.J. 1950), and United States v. Bearing Distributors, 1955 Trade Cases, Par. 68,242 .(W.D. Mo. 1955), were held to have no better standing rountervene than a member of the general public. They constitute a part of the only group—the smaller members of the Society-that the Department has sought. to safeguard from domination by the persons with whom it has negotiated the proposed order.

Nor did appellants seek intervention to aid their private litigation against the antitrust defendant, or to seek relief unrelated to that sought by the Departwent of Justice. Compare United States v. Bendix Home Appliances, 40 F.R.D. 73 (S.D. N.Y. 1949); United States v. Luciu's, 1957 Trade Cases Par. 68,656 (S.D. N.Y. 1957); United States v. Radio Corp. of Amirica, 3 F. Sapp., 23 (D. Del. 1933). There is no other litigation which could accomplish the purpose of the Covernment's antitrust suit; it is the only forum in which the unlawful competitive injury inflicted by the Society's dominating members may be remedied. Since all ASCAP members will be bound by the terms of the proposed order, the Department's acceptance and the District Court's approval of provisions that enable the dominating publisher members to retain control of evoting and the distribution of revenues in the Society will effectively bar an antitrust suit by

any members challenging such control, for it will have been sanctioned by the order.*

The foregoing decisions thus provide he aithority? for denying the intervention sought by appellants. The generalized statements they contain to the effect that the Department of Justice represents the "public interest" in antitrust litigation are wholly inapplicable when appellants' interest—the only "interest" the Department sought to protect in undertaking to modify the 1950 judgment—was plainly not adequately represented by the Department.

No doubt it will be urged that appellants' interests were adequately served by the permission accorded them to address the court below as amici curiae. Quite the contrary is true. Appellants, in supporting their motion to intervene, did not merely criticize the provisions of the proposed order. They undergook to

States v. ASCAP, 11 F.R.D. 541, 543 (S.D. X.Y. 1951); has no bearing at all on the issues presented by this appeal. The applicant-surference there was not, and had never been, an ASCAP member and was seeking to logiste in the antitrust suit his private

dispute with the Society

Appellants are aware that the court below has in the past denial motions by other members of the Society who sought to intervene in the Government ditigation against ASCAP. See United States v. ASCAP, 1956 Trade Cases, Par 68,524 (S.D. Y. 1956). No appeal was taken from that order. Moreover, the prior parties seeking to intervene, as the Court's opinion discloses, flad presented their complaints against the Society's Directors to the Department of Justice only shortly before filing their motion, and the Department was investigating the complaints at the time See Hansen letter, p. 112 of ASCAP Hearings. See also R. 560, 762,563. The proceeding in which appellants sought to intervene, on the other hand, is the final judicial stage of a three-year investigation after which the Department decided to sponsor the amendments to the 1950 judgment which, appellants assert, are plainly contrary to the interest of many of the Society's member. Another prior attempt to intervene which was denied in United

point out specific modifications which they were prepared to establish, by competent evidence, as necessary idequately to protect the competitive position of the smaller members of ASCAP from the dominating publishers. Appellants proposed, for example, alternative mehods for distributing voting power within the Society, some of which have been applied under federal and state statutes to other forms of innincorpowared business associations (R, 257-259, 295). Again, they were purposed to prove the meessity, and the feasibility, of having the Society's survey of performances conducted by an independent survey organization, which would be completely insulated from any possibility/of inflaence or central by any ASCAP members (R, 274, 475-477).

Appellants were permitted to argife, as amici, that the proposed order as a whole should be rejected by the court because of its inadequacies in these and other respects. In support of their motion to intervene, however, appellant's requested the District Court to permit them to substantiate their proposals and the necessity that they be incorporated in any amendments to the 1950 judgment, as well as the inadequacy of the representation of their interest by the Department of Justice. Appellants offered to introduce doenmemary and festimonial proof such as that which had been addited at the congressional hearing (R. 229-230, 111-149). Cf. Pyle-National Co. v. Amos. 172 F.2d 425, 427 (7th Cir. 1949). Appellants, however, were refused permission even to make offers of proof R. 444-1451.

Notivithstanding Article XVII of the 1950 independ which exfixed permits the Government of apply to the court for modification any respect (R. 122), the court below stated that it was limited to either approxing the proposed order in tata, er, by reject-

Indeed, it is wholly unclear what facts the court below relied upon in deciding to approve the proposed order. The Government, in its memorandum in support of the order, made assertions of fact. The president of the Society, and counsel retained by the Directors, made statements of fact in reports to the members of the Society, and the reports were formally received by the District Court and are part of the record in this appeal. (R. 431, 135, 136, 138). The court's opinion approving the proposed order at the conclusion of the proceedings below (R. 805-815) relies upon some of those representations (e.g., R. 807-808, 808-809, 811), recites the disagreement as

ing it, requiring a full trial on the issues framed by the 1944 complaint. Moreover, the court repeatedly stated that it could not receive testimony on the proposed amendments to the 1950 judgment and yet have the decree remain a consent decree (R '448-449, 467, 510-512). The court expressly refused to hear argument to the contrary (R, 510-512).

The court's position at the October 19 proceeding differs markedly from the view it expressed in a hearing on June 19, 1959, at which it considered with Department of Justice attorneys and counsel retained by the Directors the procedure to be followed with respect to the proposed order. Questioned by a Department attorney as to whether the court would take evidence on the proposed order, the court responded that it had not yet decided "whether or not there should be testimony taken to assure me, as the judge, that the public interest is being amply protected [by the proposed order] (R. 895-896; see also R. 899). At a further hearing on June 29, 1959, the fourt reaffirmed that it was empowered to take testimony on the proposed order, and that since the order was "an, amended [sie] to a final cousent decree, it would still be a consent decree" (R., 926-927). The, court's ruling at the October 19 proceeding that no testimony could be taken and that the proposed order must be approved in toto or not at all can not be reconciled with these cariier views, nor, indeed, with the applicable decisions of this Court. See Heighes v. United States, 342 U.S. 353, 357-358; Liquid Carbonic Corp. v. United States, 350 U.S. 869, reversing, 123 F. Supp. 653 (E.D.N.Y., 1955), and see also 121 F. Supp. 141 (E.D.N.Y. 1954).

to the facts between ASCAP and the Department of Justice (R. 809), and yet recites 'I find no factual dispute here' (R. 814). Counsel retained by the Directors immediately felt called upon to assert that 'we do not subscribe to the Government's contention with respect to the propriety of the old procedures' (ibid.).

The one thing which is clear is that appellants, by the denial of their motion to intervene, were precluded from adducing evidence either to supplement or to challenge that upon which the court below appears to have relied either in denying their motion, or in deciding to approve the degree, or both. Their prejudice is apparent.

Moreover, as a mici, appellants will, unless the decision below is reversed, be barred from proceeding further to protect their interests. They will be unable to seek review of the District Court's refusal to permit proof that would have shown the insufficiencies of the proposed order, and of the Court's approval of the order as it was submitted by the Department and the Society's Directors. E.g. Denver v. Denver Tramway Corp., 23 F.2d 287, 295 (8th Cir. 1927), certiorary denied, 278 U.S. 616; Winter Haven v. Gillespie, 84 F.2d 285 (5th Cir. 1936), certiorary denied, 299 U.S. 606. And appellants will be denied these important rights despite the fact that they are part of the only group the Department of Justice sought to reptect in andertaking to modify the 1950 judgment.

A final word is warranted on the membership vote directed by the District Court. As we have already indicated, it disclosed that the proposed order is opposed by over 40 per cent of the Society's publisher members and over 30 per cent of the writer members who east valid ballots. All of these, presumably, were

ASCAP members who were not permitted to take part, in or to influence the negotiations between the Department and the Directors on the terms of the proposed order. The existence of this large but voiceless minority within the Society who opposed approval of the proposed order underscores appellants' contention that the Department of Justice—the party to whom they and other members looked for protection from the Society's dominating publisher members—inadequately represented their interests.*

B. APPELIANTS ARE OR MAY BE BOUND BY A JUDGMENT IN THE ACTION

It is not apparent precisely how the final ground upon which the court below rested its denial of appellants' notion is related to the requirements of Roberts (a)(2). As stated by the court, appellants "were reda named party to the suit, and the suit had proceeded to acconsent judgment" (R. 461; App. A. p. 3a). In any event, is it quite clear that neither of the two objections which appear to be included in the court's ruling can be sustained.

The first part of the ruling—that appellants were not named parties to the suit by the United States—appears to accept the views urged by appellees against appellants' intervention. Appellees argued in the court below that the antitrust suit was brought against ASCAP as an entity under the antitrust laws and Rule

^{*}At is not without significance that the Amateust Subcommuttee of the House of deep escriptives Committee on the Judiciary, after tall investigation, last year recommended that sucreased intervention be permitted by private farties in antitrust consent decree proceedings. See p. 304 of Report on Consent Decree Program of the Department of Justice 1, dated January 30, 1959, pursuant to H.R. Res. 27, 86th Cong. 4st Sess.

17(b) of the Federal Rists of Civil Procedure, and hence that appellants could not establish that any judgment in the suit would bind them as members of ASCAP.

Neither the premise par the conclusion of the argument can be sustained. The complaint filed by the United States against ASCAP instituted a representative action against the Society and its then officers as representatives of the membership. Paragraph 3 of the complaint alleged:

That the members of the Society other than those members thereof specifically named became constitute a group so numerous that it would be impractical to bring all of them on before the Court by name: therefore, the aforesaid defendants named and described berein are sued as report enting all members of the Society. (R. 5).**

And Paragraph 18 alleged that the composite was filed against the defendants, the Society, "its officers and directors, and the members thereof, because of their rolations, wintly and severally" of the Sherman Act emphasis added: (R. 20). This language indicates that the United States in 1941 viewed its autitrust suit

section will the Sharpert Mr and Section 1 paragraph of a Payton Act provide the and association destine within a force of the laws of an early shall be emphased a person arrows that world is find as the ametrest laws. [1, 1781]

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⁻ The aforesaid defendants were the floor president serve and treasurer of the Seciety

as a representative action brought pursuant to Rule 23(a)(1) of the Federal Rules, a true class suit in which any judgment entered for or against the representatives of a class,—here the ASCAP membership would be respirational as to all the members of the class. E.g., Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 256; Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 148 F.2d 403 (4th Cir. 1945); Montgroupery Ward & Co. v. Langer, 168 F.2d 182 (8th Cir. 1948).

Moreover, the conclusion would be no different even were the suit deemed brought pursuant to Federal Rule 17(b). This rule merely establishes the capacity of an unincorporated association to sue or to be sued in the federal courts to enforce a substantive right existing under the laws of the United States. Rule 1, (h) co hi buly strengthen the conclusion that a judgment against an association, in such a srut would be res judicata as to its membership, for the members' position, under the rule is comparable to that of a shareholder whose corporation is shed as an "entity". Indeed, as the Court of Appeals for the Fourth Circuit made clear in the Trustall case, supra, representative actions under Rule 23(a) and "entity" suits under Rule 47(b) may be used interchangeably to enforce claims existing under the laws of the United States. since no issues of federal diversity invisdiction are presented in such litigation. 148 F.2d at p. 465.8* See

The Directors of the Society throuselves invoked the base suit device in prior litigate a involving the rights of "ASCAP" combors. Galds., Back, 307, US, no. 68, 73

^{**} The opinion in the Tunstall case states [148 F 2d at p. 405]

The manufest purpose of the prevision of rule 17th in nating to sents assume purpose ships and unincorporated asso

also Underagost v. Milloney, 256 F. 2d 334, 341 (3d Cir. 1958); certiorari denied, 357 U.S. 864; 3 Moore, Federal Practice, pp. 3435-3436 (2d cst. 1948).*

The second part of the court's ruling—that a consent judgment had been entered in the action needs no extended comment. The fact that a judgment has been entered in an action provides no ground for a refusal to permit intervention where further proceedings are necessary without which the interest of the party seeking to intervene could not otherwise be protected. Thus, intervention pursuant to Rule 24(a/(2) has been authorized in order to allow the intervening party to take an appeal where the parts that had represented his interest before a judgment was entered unjustifiably refused to do so. E.g., Pellegrina v. Nesbit, 203 F.2d 163, 465 466 (9th Cir. 1953); Walpe v. Paretsky, 144 F.2d 505 (D.C. Cir. 1944), certiorary denied, 323 U.S. 777. So here, although the Department of Justice undertook further proceedings to protect the interests of appellants and other ASCAP members, its efforts, appellants contend, were largely madequate. If this was the case, the fact that a judgment had once been intered in the suit is of no relevance in determining solution appellants' requested intervention in the reopened proceeding should be allowed.

attends is totald to not in detruct from the existing facilities as distincting prescribing over the . The language of rule leafs relating to soits against partnerships and unincorporated associations is permissive. So also is the language of rule 21 n. Tegether their provide alternative methods of benigning unincorporated associations into court.

[&]quot;I assist the as Sperry Products. Inc. Association of American fills 132 F 2d 408 (2)1 Cir. 1942 which held that a suit against three appropriate association pursuant to Rule 17(b) is not a first action, are obviously irrelevant in determining the residence effect on the association's niembers of a decision in the suit

CONCLUSION

The questions here in issue as to the application of Rule 24(a)(2) are of the utmost importance to the smaller members of ASCAP in protecting themselves against unlawful competitive injury by the dominating members of the Society. The Department of Justice has, since 1941, made three attempts to protect the smaller members of the Society, set under the order entered by the court below on January 7, that protection is still lacking in fundamental respects. Whether the smaller members, under the circumstances of this case, should be permitted to intervene in the proceeding below in order to attempt to secure charges in the proposed order which are necessary to protect their interests is a substantial question warranting plenary consideration by this Court.

Respectfully submitted.

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MARCH, 1960

APPENDIX

APPENDIX A—Excerpts from Transcript of Proceedings in United States of America v. American Society of Composers, Authors and Publishers, Civ. 13-95, S.D. N.Y., before Hon. Sylvester J. Ryan, District Judge, October 19, 1959.

APPENDIX B—Order of the United States District Court for the Southern District of New York Denying Motion to Intervene, dated November 16, 1959.

APPENDIX A

Excerpts from Transcript of Proceedings in UNITED STATES OF AMERICA'V. AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, Civ. 13-95, S.D.N.Y., before Hon. Sylvester J. Ryan, District Judge, October 19, 1359:

Mr. Horsky: Thank you, your Honor. We have filed a formal motion for leave to intervene on behalf of four publishing firms which I think you have copies of.

The Court: Yes. Let me get your papers. I know I have them here.

Whom do you represent?

Mr. Horsky: Four publishers who are listed in the first paragraph of the document which you have there.

The Court: Do I understand that you represent the Sam Fox Publishing Company, Inc.!

Mr. Horsky: That's right.

The Court: According to your petition they have been a member of the defendant Society since 1924?

Mr. Horsky: Yes, sir.

THE COURT: And I assume that they are still members: MR. HORSKY: That's right.

The Court: And you represent Movietone Music Corporation which has been a member of ASCAP since 1932?

Mr. Horsky: Correct.

THE COURT: And I assume that corporation is also a member yet. O

MR. HORSEY; Yes, sir.

THE COURT: And third is the Pleasant Masic Publishing Corporation, which, it is recited, has been a member of ASCAP since 1941. I assume that corporation is still a member of the defendant Society!

Mr. Horsky: Correct.

THE COURT: And the fourth applicant, Jefferson Music Company, is a member of ASCAP since 1945?

Mr. Horsky: That is correct, and it still is a member Tur Court: Your application to intervene is denied.

MR. HORSKY: May I be heard on that, your Honor?

THE COURT: I will hear you later on, if you want to, but I have examined the law on the subject. You are members of the defendant Society, and I feel that you have there.

fore surrendered your right to intervene as individuals. I also feel at this time, this suit having proceeded to final judgment by consent, that it will serve no useful purpose and will not promote the interests of the administration of justice or the accomplishment of the purposes of this suit to permit you to intervene. Those reasons—and, if necessary, I will write a memorandum on it although I would prefer not to do so your application to intervene is denied. You may have an exception. You may submit a formal order so that, in the event you feel aggrieved, you may take any appropriate steps that you desire.

However, I will grant to you the same privileges that I have indicated I will grant to Mr. Eastman. I will permit you not to appear in this sait, but I will permit you to address the Court as a friend of the Court so that the Court might have, in determining whether or not the proposed amendment to the consent decree should be entered, the benefit of your observations and your comments.

They was be helpful.

You will be heard, if you desire, later on as a friend of the Court. You may have an exception to any ruling

denying your right to intervene.

Mr. Horsky: I wonder if you would let me argue my motion to interpene. I think I can persuade you that this is different from most of the cases you have looked up in your researches. If you are persuaded you will not change your mind, then I will not waste your time.

THE COURT: Mr. Horsky, I am not one who believes, in my functioning here as a judge, that I possess infallibility. I have not been divinely ordained to perform any of my duties. Perhaps, when I hear you as a kriend of the Court, you have then go into this subject as to your possible right to intervene: (pp. 7-9A).

THE COURT: Don't you overlook one very important thing, and that is this. That the Government, represented by the Attorney General, is acting impartially to accomplish a just result, and that it is protecting not only the public but it is protecting, as best it can, and to the extent that it feels it should, this minority group, including the

minority group for which you speak? Don't you overlook that?

Mr. Horsky: No. 1 do not overlook that. I have not been addressing myself to that yet, because that is not the basis on which your Honor ruled out my notion to intervene in the first instance. You said I was represented

by the Society.

THE COURT: Wait a minute. Excuse me. I think you have overlooked one of the reasons why I denied you a right to intervene. I denied you the right to intervene first, because you were represented by the Society, and by the Society with your consent, you having a come a member of it.

Mr. Horsky: That is right.

THE COURT: Sec. ndly, I denied you the right to intervene because you were not a named party to the suit, and

the suit had proceeded to a consent judgment.

Third, I denied you the right to intervene because I felt that the interest that you represented and wanted to speak for was represented by the Government in the person of the Attorney General.

Mr. Horsey: All right. Now, let me speak to—I think I have addressed myself to why I believe the Society, in the person of Mr. Dean, and the board of directors, who speak for them, today, does not represent me, or my client.

THE COURT: I am not going to hear you at great length on that.

Mn. Horsky: I do not want to take any great length of time.

THE COURT: Let's confine ourselves to this decree,

Mr. Horsky: Let me say one word why the Department of Justice does not, and it is as simple as this—

THE COURT: I would prefer, though I do not want you to be precluded from going into it. I would prefer you slid not.

M. Horsky: All right, let me go on to the next thing to which we object.

THE COURT: All right. (pp. 167-169):

APPENDIX B.

UNITED STATES DISTRICT COURT ... SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff.

V

AMERICAN SOCIETY OF COMPOSERS, AUTHORS and Publishers, Defendant.

Civil No. 13-95

ORDER DENYING MOTION FOR LEAVE TO INTERVENE

Upon the motion for intervention of Sam Fox Publishing Company, Inc., Movietone Music Corporation, Pleasant Music Publishing Corporation, and Jefferson Music Corospany, Inc., dated October 13, 1959, the Pleading in Intervention submitted therewith, the Order of this Court dated June 29, 1959, together with the Proposed Consent Further Amended Final Judgment, the proposed Writers' Distribution Plan and the proposed Weighting Formula submitted therewith, the Amended Final Judgment entered March 14, 1950, and upon mailings to the membership of the American Society of Composers, Authors and Publishers dated July 10, 1959, July 21, 1959, August 26, 1959; September 4, 1959, October 5, 1959 and October 9, 1959, with proof of the service thereof; and

Having heard Charles A. Horsky, Esq., attorney for said applicants, in support of said motion pursuant to Federal Rule of Civil Procedure 24(a), subparagraph (2) or, in the alternative, pursuant to Rule 24(b), subparagraph (2); and as a friend of the court, in opposition to the Proposed Consent Further Amended Final Judgment; and

Having heard Richard B. O'Donnell and Walter E. Bennett Attorneys for the plaintiff, and Arthur E. Dean, Esq., attorney for defendants in support of said Proposed Consent Further Amended Final Judgment; and

. Having found that representation of the public and the applicants by the Department of Justice was adequate and

in the public interest; that applicants are members of and are represented by the Society with their consent; that applicants have permitted this cause in which they are not named as parties to proceed to judgment; and that it would not project the interests of the administration of justice to permit the requested intervention, it is hereby

ORDERED THAT:

Applicants' motion for leave to intervene is in all respects denied.

Dated: November 16th, 1959.

S/ Sylvester J. Ryan U.S.D.J. Chief Judge

In the Supreme Court of the United States

OCTOBER TERM, 1959

SAM FOR PUBLISHING COMPANY, INC., EL M., APPELLANTS

Composition America and American Society of Composition Authors and Principles

TRAM THE EXTEND STATES HISTORY POLICE FOR

TION OF THE UNITED STATES TO DISMISS OR AFFIRM

LEE RANKIN

Roberton Committee

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Action Resident Attorney to solve

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 788

SAM FOX PUBLISHING COMPANY, INC., ET AL.,
APPELLANTS

12.

United States of America and American Society of Composers, Authors and Publishers

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

· MOTION OF THE UNITED STATES TO DISMISS OR AFFIRM

The United States moves, pursuant to paragraph 1(a) of Rule 16 of the Revised Rules of this Court, that the appeal be dismissed, and it moves, in the alternative, pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, that the judgment of the district court be affirmed.

STATEMENT

This appeal grows out of a suit brought by the United States against the American Society of Composers, Authors and Publishers (ASCAP) charging it with violating § 1 of the Sherman Act. ASCAP is an unincorporated association and its members are authors, composers and publishers of musical compo-

sitions. They assign to ASCAP a non-exclusive right to license the public performance of their copyrighted works, and it distributes among its members the fees or royalties collected for such licensing.

The Government's suit named as defendants ASCAP, its president, its secretary, and its treasurer. The parties having consented to entry of a judgment without adjudication of the issues, a consent judgment was entered on March 4, 1941. It regulated and restricted ASCAP's licensing activities, and also three aspects of its internal operations—distribution of receipts among members, voting for ASCAP's board of directors, and eligibility for membership (R. 37-47). Its prohibitions and requirements ran solely against ASCAP and those acting or claiming to act on its behalf.

On March 14, 1950, an Amended Final Judgment which superseded the 1941 judgment was entered by consent of the parties and without adjudication of any issue of law or fact. As before, the prohibitions and requirements of the judgment ran solely against ASCAP. As before, the judgment dealt with ASCAP's licensing activities except for certain restrictions imposed (Sections XI, XIII, XV) as to distribution of receipts among members, their voting rights, and eligibility for membership (R. 106-124). A reservation of jurisdiction clause permitted "any of the parties" to the judgment to apply for its construction, modification, or enforcement, and permitted

¹ Section III made the judgment applicable to ASCAP's officers, directors and agents, "and to all other persons, including members, acting or claiming to act under, through or for such defendant."

the plaintiff to apply for vacation of the judgment any time after five years from its entry.

The United States received various complaints from ASCAP members concerning the 1950 judgment, and in 1956 it began an investigation which disclosed that certain judgment provisions should be made more specific (R. 321). It began negotiating with ASCAP in 1958, and after 30 to 40 conferences the parties agreed upon a proposed amendment of the 1950 judgment (R. 323A, 402). In the Government's view, the changes accepted by ASCAP represented the "outermost limits" to be obtained by negotiation, and also the appropriate and fair limits, and accomplished the best results possible in the absence of lengthy and difficult litigation of very uncertain outcome (R. 353–354, 365–366).

The proposed consent judgment, amendatory of the 1950 judgment, was put before the district court on June 29, 1959. Chief Judge Ryan, who had been handling questions arising under the 1950 judgment, issued an order which fixed October 19, 1959, as the hearing date for action on the proposed amendment. The order provided that any person having an interest in the proceeding might then appear and make application to be heard in opposition to approval of the proposed amendment; and it directed ASCAP to mail to each of its members a copy of the court's order, of

² The most important of the agreed changes established detailed requirements for carrying out the provisions of the 1950 judgment relating to distribution of ASCAP's receipts among its members and election of its directors (R. 73-84; also R. 49-71, 88-105).

the 1950 judgment, and of the proposed amendment (R. 48).

ASCAP accordingly mailed to its members the foregoing documents and an analysis by its counsel of the proposed judgment changes, and held membership meetings in Los Angeles and New York at which it undertook to answer questions raised by its members concerning the proposed changes (R. 125–126 and attached exhibits).

At the hearing on October 19 and 20, 1959, Chief Judge Ryan not only heard counsel for the parties, the United States and ASCAP, but also heard as amici all of the eleven other persons who asked for a hearing (R. 297-603, 646-649). Counsel for the present appellants, who was heard at great length (R. 303-306, 434-518, 660-667), conceded that the proposed amendment, in the four respects which he criticized, constituted an improvement, even if slight, over the 1950 judgment (R. 450, 474, 495, 508).

The four appellants, each of which is a music publishing company and a member of ASCAP, had filed on October 13, 1959, a motion to intervene as of right (R. 175, 181, 185). At the October 19-20 hearing, the court, in denying this motion, observed that ASCAP's management necessarily spoke for the association of which appellants were members; that no judgment, however framed, could possibly satisfy all of its members (approximately 6,400, R. 322); that, if testimony were taken, ASCAP would withdraw it consent and there would be nothing before the court; that it had

³ Formal judgment denying the motion was entered on Noyember 16, 1959 (R. 989-990).

no power to alter the terms of the proposed amendatory consent judgment; that its only alternatives were to approve or to disapprove such judgment; and that disapproval would leave the 1950 judgment in effect (R. 438-439, 442, 445-448, 461-462, 467, 510-512).

Since the proposed judgment provided (Section VII, R. 86) that it be vacated unless within three months from its entry ASCAP's membership had consented to a change in its articles of association, necessary to give effect to certain provisions of the proposed judgment, the court decided that it would not act prior to a decision by the members that they would approve the required change in ASCAP's articles of association (R. 318-319). The court stated that it wished to have the entire membership ballot on the question of approval or nenapproval of the proposed consent judgment (including the provisions not requiring change in the articles of association), such balloting to be conducted under the supervision of a member of the bar appointed by the court. As directed by the court, all ballots were to be mailed to this appointee and to be opened and tabulated in open court. There was to be separate tabulation of writer members and publisher members, and of subclassifications of each, and these classifications and subclassifications were to be tabulated both on a per capita basis and on the weighted

For writer members, the subclassifications were: (a) non-participating members, and, participating members, those with (b) one voice, (c) 2 to 5 votes, (d) 6 to 25 votes, (e) 26 to 50 votes, (f) 51 to 100 votes, (g) 101 to 250 votes, (h) over 250 votes (R. 719).

For publisher members, the subclassifications were those with (a) one vote, (b) 2 to 3 votes, (c) 4 to 5 votes, (d) 6 to 10 votes, (e) 11 to 20 votes, (f) over 20 votes (R. 720).

voting basis provided in ASCAP's bylaws (i.e., weighted to reflect the members' varying contributions to ASCAP's catalogue). R. 640-641, 643, 645, 652-653, 655-656, 659, 1010-1014.

ASCAP agreed to, and did, pay \$1,000 of the expense of mailing to its members a circular prepared by those advocating a negative vote on the proposed consent judgment, and also mailed all letters which individual members wished to have circulated with reference to this vote (R. 660-662, 735-736). In addition, prior to the balloting, special membership meetings were held on the West Coast and in New York to give ASCAP members furtuer opportunity to discuss the proposed consent judgment (R. 992-1009).

When the votes were tabulated in open court on January 6, 1960, by independent auditors designated by the court, they reported that on a weighted basis 63% of all votes which had been cast were in favor of the proposed consent judgment, and that on a per capita basis (of those voting) approximately 60% of the pablisher members and 70% of the writer members had voted "Yes" (R. 744-746). Their tabusation also showed that each of the eight writer and each of the six publisher subclassifications had voted in favor of the proposed judgment both on a per capita and a weighted vote basis (R. 1154).

The following day, the court, after hearing those who asked to be heard, including appellants, counsel, delivered an oral opinion which summarized the nature of the changes embodied in the proposed consent judgment and the reasons therefor (R. \$6-813). The court concluded that this judgment, l'although not a

panacea for all the alleged ills besetting the Society," does represent "definite improvement" over the existing judgment provisions, and "will serve to advance the antitrust purposes of the Government's suit and of the prior decrees" (R. 812–813). The court accordingly signed the proposed consent judgment (R. 816–830).

Appellants' appeal, filed on January 14, 1960, is from the order denying their motion for leave to intervene entered on November 16, 1959 (R. 877, 880). They did not appeal from the final judgment in the cause entered on January 7, 1960 (R. 877).

ARGUMENT

I

MOTION TO DISMISS

The appeal is under § 2 of the Expediting Act, 15 U.S.C. 29, which provides that in any civil antitrust action by the United States appeal from "the final judgment" of the district court lies only to this Court. We submit that the Court is without jurisdiction since appellants have appealed solely from the district court's interlocutory order denying their motion for teave to intervene, and have not appealed from "the final judgment" of the district court entered on January 7, 1960.

In Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 45-546, this Court distinguished between the appeals from all final decisions" of district courts authorized by 28 U.S.C. 1291, where decision of a claim of right, if the claim is sufficiently separable and independent from the main cause, may have finality even though the whole case has not been adjudicated, and appeals under a statute where Congress has allowed appeals "only from those final judgments which ferminate an action." The appeal allowed by the Expediting Act is of the latter type. By that Act, "Congress limited the right of review to an appeal from the decree which disposed of all matters, see Coilins v. Miller, 252 U.S. 364; and it precluded the possibility of an appeal to either court from an interlocutory decree." United States v. California Cooperative Canneries, 279 U.S. 553, 558.

Appellants' failure to appeal from "the final judgment" in the cause is more than a mere technical defect. As their "Questions Presented" state (J. St. 4), they sought leave to intervate in order to vrge changes in the "proposed" modification of the judgment. Entry of the consent judgment of January 7, 1960, terminated the proceeding in which intervention was sought, and, since the appeal does not attack that judgment," it moots the issues presented by the appeal.

In Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137, the appeal was from denial of intervention in a Government civil antitrust action. The district court had entered a final judgment on the merits of the proceeding in which intervention was sought after the filing of the petition for appeal but before

They were permitted too and did, urge such changes as amici (supra: p. 4).

^{*} Not only have appellants not appealed therefrom, but their notice of appeal and jurisdictional statement request no relief against this judgment.

allowance thereof by the district court. Although this Court discussed the question of whether the appellant was entitled to intervene, it viewed an order denving intervention as non-appealable under the Expediting Act. It said that such an order "is but an order in the cause and not the final judgment", and that one of the purposes of the Expediting Act in 'limiting appeal to "final decrees" was "to prevent the delay of unwarranted appears by disappointed applicants to intervene, which would suspend the ultimate disposition of suits under the antitrust act * 322 U.S. at 142. Nor do we think that the Court declared, even by way of dictum, that appeal from denial of intervention might lie by treating it as if taken. from the district court's final judgment on the merits. It said (ibid.) that "if we treat the appeal as taken from that final decree, as we think is required by the Expediting Act, and as attacking that decree because the appellant had been wrongfully denied intervention, we should have to affirm the judgment" (emphasis supplied), but the hypothetical nature of this statement is shown by the fact that the Court then proceeded to dismiss the appeal (id. at 143).

Of the three cases cited by appellants in support of this Court's jurisdiction (J. St. 3), only Sutphen Estates, Inc. v. United States, 342 U.S. 19, was an appeal under the Expediting Act, but there the appeal was from both the court's final judgment and the order denying intervention. In Missouri Kunsas Pipe Line

The then Rules of this Court required these steps in appealing from the district court to this Court.

12.

Co. v. United States, 312 U.S. 502, which appellants do not cite, right to intervene was grounded on the fact that the consent judgment entered in a Government antitrust action provided that Panhandle, the would-be intervenor, might "become a party" to the cause, and was thereby given a right to intervene in a proceeding to modify this judgment. Denial of intervention was held to be, with respect to this right, "a definitive adjudication, and so appealable." 312 U.S. at 508. But in the Pipe Line case, unlike here, no final judgment on the merits of the modification proceeding had been entered prior to the appeal from the order denying intervention or prior to this Court's decision on appeal."

H

MOTION TO AFFIRM

Appellants attempted to intervene with respect to a proposed amendment, by consent of the parties, to a consent judgment entered in an antitrust action brought by the United States under § 4 of the Sherman Act. In their own words, their purpose was to urge "changes" in the proposed modification of the judgment then outstanding (J. St. 4). But change in the proposed modification, being dependent upon consent thereto by the parties, was something which the district court had neither the power to require nor the right to demand. The single issue before the court was approval or disapproval of the proposed modification. At the most the court could, as appellants im-

^{*}The discrict court had rendered an "opinion" with respect to the proposed modification before the appeal was decided. 312 U.S. at 505.

pliedly urged, withhold its approval of the proposed modification until or unless the parties gave their consent to the further or different changes advocated by appellants.

The anomalous nature of the attempted intervention is highlighted by the fact that appellants did not seek leave to intervene either as parties plaintiff or as parties defendant." In substance, they sought to intervene in the role of friends of the court, in which role. they were given a full hearing. Obviously they could not intervene as parties plaintiff, at least in the absence of consent thereto by the United States; by statute, only the United States may bring a § 4 Sherman Act proceeding.10 If they had been granted leave to intervene as of right as parties defendant, grant of such leave would have had to be based upon a finding that appellants will or may be bound by the proposed judgment modification. On that basis, their consent to change in the judgment would be necessary and, by withholding their consent, they could exercise power of. veto, over entry of any consent judgment modifying the 1950 judgment. Furth rmore, if appellants, four of the some 6.400 ASCAP my abers, may intervene as of right as parties defendant, every other member and minority group of members has the same right and the same power to veto entry of any consent judgment,

It is scarcely necessary to point out that if the district court had recognized the right of intervention

See their Pleading in Inervention (R. 175-181).

Neither a State nor a private party may maintain an action under this section. Minnesota v. Northern Securities Co., 194 U.S. 48, 71; Paine Lumber Co. v. Neal. 244 U.S. 459, 471. See also infra, pp. 16-20.

claimed by appellants, this would have paralyzed change, by way of consent, in the 1950 judgment. The effect would have been to prevent entry of a judgment which the court entered only after (1) all ASCAP members had been given full apportunity to appraise the over-all acceptability of the proposed judgment change, (2) a majority of every significant subclassification of the membership had voted in favor of the proposed change, (3) the court had patiently heard the objections of all dissident members, and (4) appellants had conceded that the proposed change represented some improvement over the existing judgment.

By the very nature of ASCAP's functions and objectives, and its structure as a lapted thereto, the interests of particular categories of its members are in conflict with the interests of other categories respecting the matters as to which appellants' intervention application was directed—the voting rights of members and the basis for determining distribution of ASCAP's net receipts among its members. The greater the voting rights accorded to a particular category or categories, the smaller the proportion of the total accorded to others. Likewise, the larger the distribution of receipts to a particular category or categories, the less is available for other categories.

Appellents nevertheless urge that they are entitled to intervene as of right under Rule 24(a)(2) F.R. Civ. P, which grants such right—

when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action * * *. Appellants concede (R. 188) that a party seeking to intervene as of right pursuant to this Rule must establish both that his interest may be inadequately represented by existing parties and that he may be bound by a judgment in the action. We believe that appellants do not satisfy either requirement.

A. Appellants appear to contend that they will be bound by any consent judgment modifying the 1950 judgment because (1) ASCAP will be bound by the modified judgment and (2) appellants are members of ASCAP. But the only respect in which ASCAP is bound by that judgment is that it specifies, while it remains in effect, the relief against ASCAP in the Government's antitrust action. With respect to any claim or cause of action which appellants may have against ASCAP, the judgment is not res judicata and appellants are not bound by the judgment. Sutphen Estates, Inc., supra, 342/U.S. at 21; Credit Commutation Co. S. United States, 177 U.S. 311. Indeed, appellants do not consider themselves so bound.

If appellants are not bound, in the prosecution of such claims, by the 1950 consent judgment, they equally are not bound by the amendatory 1960 judgment.

One of them, Pleasant Music Publishing Corp., is a plaintin ("on behalf of itself and all other publisher members of" ASCAP) in a pending action against ASCAP in a New York State court which charges misfeasance, nulfeasance, and other illegality as to matters within the scope of the antitrust judgment, Lengsfelder et al. v. Cunningham, Index No. 13344-1957 (Sup. Ct., New York Coanty). The Second Amended Complaint in that action (filed 4/9/58) alleges, inter alia, that ASCAP's weighted voting system is "illegal, null and void" and that its board of directors "unlawfully discriminate in the distribution of ASCAP's receipts among its members (pars. 40, 41).

The 1960 consent judgment amends or supplements particular sections or subsections of the 1950 judgment, but makes no change in the prior judgment as to those subjected to its prohibitions and requirements, namely, ASCAP and those acting "under, through or for such defendant" (supra, p. 2). Since appellants would not and could not be acting on behalf of ASCAP with reference to its internal affairs—the sole matters covered by the 1960 consent judgment-they are not bound by the judgment. While it might be urged that a judgment which binds ASCAP indirectly binds appellants by virtue of their membership in ASCAP, on the same reasoning each ASCAP member is, through the medium of ASCAP, a party, not a "stranger"; to the action, and foundation for intervention, whether permissive or mandatory, is lacking. "Intervention may be defined as the procedural device whereby a stranger can present a claim or defense in a pending action or in a proceeding incidental thereto, and become a party for the purpose of the claim or defense presented". Moore, Federal Practice, 2d ed., par. 24.02.

B. Appellants were properly denied intervention upon the further ground that they failed to establish the other requirement for intervention as of right under Rule 24(a)(2), i.e., that their interest is not adequately represented by existing parties. As to representation of their interests by ASCAP, appellants, by becoming and remaining members of that association, assented to management of its affairs by

its board of directors as provided in its articles of association. The views of the board as to what judgment changes best serve the interests of the membership as a whole did not coincide with appellants' views, but this does not establish that their interest was not adequately represented by ASCAP.

We do not elaborate further on the adequacy of ASCAP's representation of appellants' interest, a matter which is more within the province of appellee ASCAP. However we note that the district court fund (R.812):

The proposed judgment has been consented to by the attorneys for ASCAP with the unanimous approval of the Board of Directors as in their judgment accomplishing the best possible results for the Society as a whole and for its individual members.

In any event, appellants' interest is, for the purposes of Rule 24(a, 2), represented and protected by the United States. In Government civil antitrust actions, the judgment entered is likely to affect the interests of non-defendants in a variety of ways—as competitors of a defendant, as purchasers or distributors of its goods, as licensees of its patents (as here), as members of a defendant unincorporated association, etc. The Attorney General or his delegate must and does formulate his request for relief in the light of such diverse interests and in a manner designed to achieve antitrust objectives and to bring about a feasible accommodation of producer, consumer, and other

interests, sometimes superficially in conflict but basically interlaced.

Just as institution of suit and the scope of the charges made therein are committed solely to the Attorney General, so in the conduct of litigation he. must have the control which goes with being sole party plaintiff. To permit, right of intervention on the tleory that the Attorney General's conduct of particular antitrust litigation does not adequately represent the public interest therein would open the door to a multitude of intervenors, each clothed with power to introduce evidence, inject additional issues, and exercise right of appeal.12 In short, the Attorney General is, in this class of litigation, "the guardian of the public interest in enforcing the antitrust laws". Cf. Pipe Line case, supra, 312 U.S. at 505. The presumption that he is responsibly performing his enforcement functions is not to be overcome by mere allegation of mistaken judgment respecting what constitutes appropriate and necessary relief.

The authorization by Congress of private antitrust suits for damages and for injunctive relief, and its aid to and encouragement of such suits by permitting recovery of triple damages and by giving the plaintiffs in private antitrust actions an important evidentiary advantage by reason of judgments of yiolation entered

¹² The resulting proliferation of appeals would be in the face of the purpose of the Expediting Act to limit appeals in this type of case to a single authoritative decision by this Court on the merits of the case.

in Government antitrust saits, reinforces the conclusion that in suits brought by the United States the prosecuting arm is reserved to it alone. Private parties wishing to play the role of "quasi attorneys coneral" in enforcing the antitrust laws can do so, not in Government suits, but in suits of their own under the ample remedies provided by the Clayton Act. See United States v. Bendix Home Appliances, 10 F.R.D. 73, 76 (S.D.N.Y.).

In the early case of United States v. Northern Securities Co., 128 Fed. 808, 812 (S.D. Minn.), the court, in denying intervention as to the relief to be granted by the judgment in a Government antitrust action, said:

It [the United States] is the conservator of the public welfare, and has a right to speak for the public. According to well-established rules, the petitioners cannot intrude into this litigation merely to protect the public interest or as amici curiae, so long as the government is present by its attorney general and expresses its disapproval of such intrusion. This would be

¹³ Any person injured by violation of the antitrust laws may bring an action to recover threefold his damages (§ 4 of Clayton Act, 15 U.S.C. 15), and any person may obtain injunctive relief against threatened loss or damage by a violation of these laws (§ 16 of Clayton Act, 15 U.S.C. 26), and in such suits a final judgment in a Government antitrust proceeding (not including consent judgments entered before testimony has been taken) shall be prima facie evidence against the defendants as to matters respecting which the judgment would be an estoppel as between the parties to the Government suit (§ 5 of Clayton Act, 15 U.S.C. 16).

wresting from the government that control over the litigation, so far as the public is concerned, which it has a right to exercise.

In Bendix Home Appliances, supra, the court denied intervention sought as a means of enforcing alleged requirements of a consent judgment entered in a Government antitrust action. The court, per Rifkind, J., said (10 F.R.D. at 76):

It would seem to be a necessary corollary of this dichotomy of rights which underlies the structure, of the anti-trust laws that private persons may not intervene in suits which are maintainable only by the United States. And this corollary should apply whether the particular action is for enforcement of the anti-trust laws, or for the enforcement of decrees rendered under those laws.

The court further said (id. 77):

The very fact that the Congress has made an adjudication in a Government suit prima facie evidence of certain facts in a private suit would indicate that it was not the intention of the Congress that private parties should be permitted to apply for private relief at the foot of a decree entered in a Government suit. 15 U.S.C.A. § 16. * * * Intervention, if allowed here, would tend to defeat the policy behind the distinction drawn by section 16 between litigated decrees and consent decrees.

In United States v. Bearing Distributors Co., 1955 'Trade Cases, par. 68,242 (W.D. Mo.), intervention, sought in order to secure enforcement of a consent

judgment entered in a Government antitrust action, was denied. The court, per Mr. Justice Whittaker (then district judge), observed that the applicant's purpose was to "assume prerogatives of the Attorney General", and that in the action "instituted by the Government for public protection" the United States of represented the applicant's interest.

In the instant case, three prior applications for intervention have been denied. Unreported order entered January 25, 1949 (Civ. 13-95, S.D.N.Y.); United States v. ASCAP, 11 F.R.D. 511 (1951); United States v. ASCAP, 1956 Trade Cases, para 68,524 (S.D.N.Y.). In the 1951 ruling, the court said (11 F.R.D. at 513):

The protection of the public interest rests upon those officials whose special responsibility and duty it is to enforce the laws. To permit intervention by private citizens, whose purpose in the main is self interest, in proceedings instituted by the Government is more likely to hinder rather than help in the enforcement of laws.

In numerous other cases, intervention for the purpose of modifying, implementing or enforcing the relief against defendants in Government civil antitrust actions have been denied. Indeed, we are aware of no case in which, over the opposition of the United States, intervention was allowed in these cir-

<sup>United States v. Radio Corporation of America, 3 F. Supp.
23 (D. Del.); United States v. General Electric Co., 95 F. Supp.
165 (D.N.J.); United States v. Loew's, Inc., 1957 Trade Cases, par. 68,656 (S.D.N.Y.); United States v. Paramount Pictures, 334 U.S. 131, 176-178.</sup>

cumstances." Intervention with Government acquiescence involves altogether different considerations because the Government, by its acquiescence or support, in effect adopts for itself the intervenor's contentions.

In the light of the consistent body of authority which we have cited, we submit that appellants' attack upon the district court's order denying intervention clearly presents no substantial issue warranting plenary review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal should be dismissed as not within this Court's appellate jurisdiction or, in the alternative, that the appeal presents no substantial question and the order of the district court denying intervention should be affirmed.

J. LEE RANKIN,
Solicitor General.
ROBERT A. BICKS,
'Acting Assistant Attorney General.
CHARLES H. WESTON,
Attorney.

APRIL 1960.

¹⁵ We do not regard the *Pipe Line* case, supra, as a deviant since there the intervention was pursuant to right of intervention given by the court's earlier judgment and was in "vindication of the decree". 812 U.S. 508.

United States v. Terminal Railroad Assn. of St. Louis, 236 U.S. 194, 199, which appellants cite (J. St. 20), involved the right to be heard, not intervention as a party.

FILE COPY

No. 788

MAIN ...

Supreme Court of the Hented States

October Term, 1959

Appellers

ON APPEAL FROM THE STATES STATES WISTBUT GOVERN FOR THE SOUTHERS DISTRICT OF NEW YORK

MOTION OF APPELLEE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS TO DISMISS THE APPEAL OR TO AFFIRM

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IN THE

Supreme Court of the United States

October Term, 1959

SAM FOX PUBLISHING COMPANY, INC., ET AL.,

Appellants

United States and American Society of Composers, Authors and Publishers.

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF APPELLEE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS TO DISMISS THE APPEAL OR TO AFFIRM

Defendant-appellee American Society of Composers, Authors and Publishers moves pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States (i) to dismiss the appeal sought to be prosecuted by Sam Fox Publishing Company, Inc., et al., from the order of the United States District Court for the Southern District of New York denying appellants' motion to intervene in this action as this Court has no jurisdiction to entotain the appeal, or. (ii) that the order of the District Court be affirmed.

Statement

The detailed facts are set forth in the statement of appellee, the United States, in its motion to dismiss or affirm.

Appeller, American Society of Composers, Authors and Publishers (hereinafter "ASCAP" or "the Society"), is an unincorporated association of approximately 6,400 composers, authors and publishers of musical compositions. The members grant to the Society a non-exclusive right to license the public performance of their music, the resulting license fees being distributed among its members.

Appellants, four of the publisher members of the Society, have appealed from an order denying their motion to intervene in the District Court in connection with the entry of a consent further amended final judgment (hereinafter "the final judgment") against the Society in an action brought by the United States under Section 4 of the Sherman Act. Appellants were not parties to either the Briginal 1941 cousent judgment or the 1950 amended consent judgment, both of which were solely against the Society as a jural entity (R. 37-47a, 106-124).

Appellants have not appealed from the final judgment entered in the District Court. They agreed in the District Court that the question before Chief Judge Ryan was either to approve or to disapprove the judgment which had been submitted on consent of the parties, i.e., the plaintiff the United States and the defendant Society (R. 446). Appellants sought intervention as a means of compelling the parties to agree upon a different judgment from the one to which they had consented. The method suggested by appellants for forcing such agreement was to have the Court

indicate in an opinion that some different judgment should be entered (R. 448). Judge Ryan pointed out that he could not compel either party to consent to a judgment different from the one presented on consent (R. 446), and that he could not do so "indirectly, without hearing evidence" (R. 467).

Although their motion to intervene was denied, appellants were heard at length in the District Court as amicicuriae (R. 303-306, 434-518, 660-667). Their counsel made no objection to some of the provisions of the proposed final judgment and, as to those to which he objected, he agreed that they represented improvements over the 1950 judgment (R. 450, 474, 495, and 508). Thus, appellants could not have been prejudiced by the final judgment.

After two days of hearings, Judge Ryan directed that a vote of the membership be taken on the proposed final judgment (R. 653, 659-660, 665). In secret balloting conducted under the supervision of the District Court, the members voted overwhelmingly to approve the judgment, by a vote of approximately 83% of the total number of eligible votes on a weighted basis* and 67% of all votes cast on a per capita basis (R. 676, 1154). Moreover, Judge Ryan ordered that the votes on a per capita basis be tabulated by groups of members according to their relative income from the Society (R. 1013-1014) and, in each group of writer and *

^{*} Under the Articles of Association, as amended upon the entry of the 1950 judgment, each writer member had one vote for every \$20 received by him from the Society in the prior fiscal year, and each publisher member had one vote for every \$500 of such receipts. Total writer votes were then given a weight of 50% and total publisher votes were given a weight of 50% in determining the outcome of the voting.

Judge Ryan thereupon approved the final judgment on January 7, 1960, stating in his opinion:

"The proposed judgment has been consented to by the attorneys for ASCAP with the unanimous approval of the Board of Directors as in their judgment accomplishing the best possible results for the Society as a whole and for its individual members. It is also the belief of the Antitrust Division that the decree is the best that today can be devised and framed; if recommends approval by the Court without qualification.

"After careful consideration by the Court of the arguments for and against the approval of this proposed consent judgment, the Court finds that although not a panacoa for all the alleged ills besetting the Society, the decree does represent definite improvement over existing procedures and that it will serve to advance the antitrust purposes of the Government suit and of the prior decree." (R. 1198-1199)

The final judgment was entered on January 7,4960 (R. 816-872). On January 14, 1960 appellants appealed from the order denying intervention (R. 877-882). They did not appeal from the final judgment itself, and in their statement of the questions presented, as set forth in their notice of appeal (R. 879-880) and jurisdictional statement (J. St. 3-4), appealants make no claim that the final judgment adversely affected them.

ARGUMENT

The appeal should be dismissed because:

- 1. Not having appealed from the final judgment, appellants cannot invoke the jurisdiction of this Court to review the denial of their motion to intervene.
 - 2. In any event, intervention was properly denied.
 - 3. No substantial question is raised by appellants.

The Expediting Act Does Not Confer Jurisdiction On This Court Over This Appeal

In attempting to appeal to this Court from the order of the District Court denying their motion to intervene, appellants rely on the Expediting Act, 32 Stat. 823 (1903), as amended, 15 U.S.C. 429 (1952), as conferring jurisdiction. This statute provides:

"In every civil action brought in any district court in the United States under any of said acts," wherein the United States is complainant, an appeal from the fire judgment of the district court will be only to the Supreme Court."

In providing for appeal only from final judgments and only to this Court, "Congress limited the right of review to an appeal from the decree which disposed of all matters.... and it precluded the possibility of an appeal to either Court [this Court or a Court of Appeals] from an inter-

^{*} The reference includes Section 4 of the Sherman Att.

locatory decree" (United States v. California Cooperative Canneries, 279 U. S. 553, 558 [1929]) such as "denial of a motion for leave to intervene" (id. at 559).

An appeal under the Expediting Act must be taken from the final judgment; an appeal does not lie solely from an order denying intervention. See Allen Calculators, Inc. v. National Cash Register Co., 322 U. S. 137, 142 (1944), which is discussed in the motion of appellee the United States. The final judgment in the present case was the consent further amended final judgment of January 7, 1960. Appellants are not appealing from the final judgment. The interlocutory order denying intervention, which aione is being appealed, was not "the final judgment" specified by the Expediting Act.

Of the cases cited by appellants to support jurisdiction, only Sutphen Estates v. United States, 342 U. S. 19 (1951), involved the Expediting Act. In that case, unlike the present one, the appeal was from both the final judgment and the order denying intervention and, also unlike the present case, the purpose of the attempted intervention was to object to the final judgment which the intervenors alleged would infringe their rights.

In June 1959, the proposed final judgment was presented to Judge Ryan; hearings were held on October 19 and 20, 1959, when they were adjourned to January 6, 1960, to permit the members of the Society to vote on the proposed judgment (R. 641). On November 16, 1959 the Court below entered its order denying appellants' motion to inter-

^{*} Even though the appeal in Satphen was from the final judgment as well as the order denying intervention, the appeal was dismissed because intervention had been properly denied.

vene (R. 989-991). On January 7, 1960 appellants renewed their motion which was again denied (R. 782). Although the final judgment had been entered on January 7, 1960, appellants, in their notice of appeal filed on January 14, 1960, appealed only from the November 16, 1959 order denying intervention.

Failure to appeal from the final judgment is no oversight. Appellants' failure to appeal from the final judgment is consistent with the nature and purpose of their attempted intervention as set forth below at pages 11 to 15.

Appellants conceded in the District Court that the only provisions of the judgment of January 7, 1960 to which their jurisdictional statement advects were an improvement over the previous judgment of March 14, 1950 (R. 450, 474, 495). Neither appellants' jurisdictional statement nor their notice of appeal purports to present for this Court's consideration any question about the final judgment of January 7, 1960. Appellants do not claim to have been injured by the final judgment. Thus, appellants do not urge a review of any action taken by the District Court except its refusal to accord appellants the status of intervenors. That, of itself, is not appealable under the Expediting Act.

Moreover, the only question before the District Court when appellants sought intervention has been finally disposed of by the entry of the final judgment, from which no appeal has been taken; indeed, the time to appeal from that judgment has now expired. Thus, in any event, the question of intervention has become moot.

2. Intervention Was Properly Denied

Appellants predicate their claimed right of interventain solely upon Rule 24(a)(2) of the Federal Rules of Civil—Procedure which requires both that "the representation of the applicant's interest by existing parties is or may be inadequate" and that "the applicant is or may be bound by a judgment in the action." The question of the adequacy of the representation of appellants interest by the plaintiff, the United States, and the question whether appellants are or may be bound by a judgment in the action, are covered in the motion of the United States. We shall confine our discussion to the adequacy of defendant's representation of appellants' interests as members of the Society.

Judge Ryan found that appellants are members of and are represented by the Society with their consent (R, 990). He also took great pains to ascertain and ensure that the Society, acting through its Board of Directors, adequately represented the Society's membership. To that end, Judge Ryan carefully devised procedures whereby the members had full opportunity to review the proposed judgment, to study the arguments pro and con, and to vote on the question whether it should be approved. Judge Ryan did not enter the judgment until he had satisfied himself that it had been approved by a majority of the votes cast in each class of the Society's membership.

When presented with the proposed final judgment on consent of both of the parties, the Court on June 29, 1959 ordered that a copy of the judgment be sent to each of the members, together with a notice of a hearing on October 19, 1959 at which all members opposing the judgment would

be given adequate opportunity to present their views to the Court (R. 48). During this period, membership meetings were held in New York and Los Angeles to discuss the proposed judgment and to answer any questions of the members, and the Society and the Department of Justice answered immerous written questions from members (R. 125-142, 956-985).

At the Court hearing on October 19 and 20, 1959, the approximately 230 members who so desired (including appellants) were allowed by the Court to express at length, either pro-se or through counsel, their views as amicicuriae (R. 297-675). These members expressed views ranging from opposition to the proposed judgment because of a preference for the status quo (e.g., R. 521-527, 546-549; see also R. 1117-1118) to opposition to the proposed judgment because various provisions were not those desired by the particular member (e.g., R. 434-518, 528-545, 581-585; see also R. 1120-1121, 1124-1126).

The hearings were then adjourned to January 6, 1960 to permit a vote by the membership (R. 641). In connection with the voting, those members who wished to express their views of the proposed final judgment to the membership by mail were afforded full opportunity to do so; literature was sent by various members and groups of members to other members (R. 1113-1151) and, at the suggestion of counsel for appellants (R. 660-662), the Society paid \$1,000 toward the mailing of literature by appellants and others who were urging a vote against the judgment. During this period, further membership meetings were held to discuss the judgment (R. 995-997).

The vote of the membership was contemplated in the proposed final judgment when it was first presented to Judge Ryan in June 1959. Certain amendments to the Society's Articles of Association were required before the Society could finally consent to the judgment and provision was made in Section VII thereof that it would not become effective unless the consent of the membership was obtained (R, 86).

As counsel for appellants recognized, this consent had to be obtained by a vote of the entire membership and not by the vote of the Board of Directors or any other group within the membership (R. 443).

Judge Ryan directed that a vote be taken, prior to his approval of the proposed judgment, to ascertain whether the membership approved the entire judgment (R. 641). Appellants expressly endorsed this procedure (R. 650). The vote was taken by mail under procedures specifically designed by the Court to safeguard the secrecy of the ballot and to ensure the impartiality of tabulation (R. 676; 1010-1014; 1068-1186).

After the ballots were tabulated in open court on January 6, 1960; under the supervision of Judge Ryan (R. 709-752), it became plain that appellants' interests as members of the Society had been adequately represented. The Court had ordered that the votes be tabulated both on a weighted basis and a per capita basis, as well as by classes of members (R. 1013-1014). On the weighted vote, over 80% of the votes cast were in favor of the judgment. On a per capita basis, 70% of the writer members voting, and 60% of the publisher members voting, voted in favor of approval of the judgment. Moreover, a majority of the votes cast in

each of the eight classes of writer members and each of the six classes of publisher members (classified on the basis of the amounts they received through the Society in 1958) were in favor of the judgment on a per capita basis (R. 676, 1154).

Thus, although appellants purportedly seek to protect the smaller members" of the Society (J. St. 30), whose interests they assers were not adequately represented, a majority of the smaller members voting were in favor of the judgment.

After the vote had been tabulated, appellants suggested to the Court that the parties renegotiate the provisions of the consent judgment, arguing that "the most you would lose by that mode of conduct is that [they] will just report back to you further that nothing could be done" (R. 774). Appellants conceded, however,

"Certainly you will never get unanimity... and no one will ever expect that all of the members of the Society will agree." (R. 779)

Judge Ryan observed:

The second observation is this. That you are dividing approximately 24 or 25 million or 26 million. —I don't know how much it is: it goes up each year—among 6,000 people, six thousand odd people, writers, publishers, individuals, estates and corporations, widows and orphans, and those who are otherwise situated.

"Now when you divide that amount of money amongst that number of people, human nature is such that you are not going to get any extent of unanimity of opinion because few men are content with what they receive in this life, even though their neighbors may feel they are getting far more than they ever either earned or deserved.

"Now I am surprised that there is such a large number who have consented, because it shows that even balancing their own selfish interests against the proposed plan, they have determined, 'Well, perhaps this isn't as much as we should get, but we think it is fair.'" (R. 776)

Appellants thereupon renewed their motion to intervene, and it was again denied (R. 782-783).

It is submitted that, in light of the free and full opportunity provided all members to inform themselves and each other concerning the proposed judgment and in light of the vote of approval by every class of members, there can be no question but that the interest of all members in the Society as members was adequately represented.

Notwithstanding the fact that appellants had no right to be heard as parties or in any other capacity, Judge Ryan gave them ample opportunity to be heard as amics curiae. During the course of the hearing, counsel for appellants was questioned by Judge Ryan on the three provisions of the judgment to which appellants refer in this Court. Counsel conceded that each of these three provisions was an improvement over the corresponding provision of the 1950 judgment (R. 450, 474, 495).

Counsel for appellants conceded that Section II, providing for a scientific survey of performances on which to base the distribution of royalties, was an improvement (R. 474). His complaint was that the judgment does not require (although it does not forbid) the survey to be conducted precisely as appellants desired. However, the judgment provides that the plaintiff, after 18 months, may seek additional relief with respect to the survey (R. 819), and the District Court has appointed two qualified independent persons, former New York Supreme Court Justice John E. McGeehan and former United States Senator Irving M. Ives, periodically to examine the design and conduct of the survey, to make estimates of its accuracy, and to report thereon to the Court and the parties (R. 1189-1190).

Counsel for appellants conceded that Section III(F) was an improvement (R. 495), even though the judgment does not require the Society to assign to the various types of music performances the exact weights which appellants desire instead of those approved by the members. However, the judgment gives the Society latitude in this respect (R. 845).

Counsel for appellants conceded that the new voting formula provided by Section IV represented an improvement over the one then in effect (R. 450). The new voting formula had been overwhelmingly adopted, in the election supervised by Judge Ryan, as an amendment to the Society's Articles of Association and—being consistent with the 1950 judgment—became effective irrespective of the entry of the final judgment of January 7, 1960. It not only reduces substantially the number of votes any single member can have but it also permits any group representing 1/12th of the votes held by either the writer or publisher members to nominate and elect a director by petition.

Appellants' "Ståtement of Questions Presented" characterizes the attempted intervention as being "for the purpose of urging changes in the proposed modification of the judgment", but significantly does not assert that appellants were injured by the judgment (J. St. 4). Thus, the attempted intervention asserts no justiciable claim or defense.

Intervention is the procedural device

"whereby a stranger can present a claim or defense in a pending action or in a proceeding incidental thereto, and become a party for the purpose of the claim or defense presented." 4 Moore, Federal Practice? par. 24.02.

Appellants cannot claim a right to intervene on the assertion that this is a class action and that they are members of the defendant class. This is not a class action and appellants did not seek to intervene on the side of the defendant in order to interpose any defense on its behalf. In urging amendments to which the Society would not consent, appellants were "urging", if anything, a claim on behalf of the plaintiff. However, in an antitrust action brought by the Government, mandatory intervention is not available, over the Government's objection, to urge an antitrust claim on behalf of the United States; nor nay appel-

^{*} The action is against the Society as a jural entity and the judgment runs only against it. See Federal Rule of Civil Procedure 17(b); Sherman Act §8, 15 U.S.C. §7 (1952); Clayton Act §1, 15 U.S.C. §12 (1952); Brown v. United States, 276 U.S. 134 (1928); United Mineworkers v. Coronado Coal Co., 259 U.S. 344 (1922); Sterry Products, Inc. v. Association of American R.R., 132 F. 2d 408 (2d Cir. 1942).

lants, claiming to be members of a defendant class, intervene to assert claims against the class.

Since intervention was thus properly denied, the present appeal must be dismissed. See Sutphen Estates v. United States, 342 U. S. 19 (1951); Allen Calculators, Inc. v. National Cash Register Co., 322 U. S. 137 (1944).

3. No Substantial Question is Presented by the Appellants

The Expediting Act does not confer jurisdiction over this attempted appeal.

The question before the District Court has been finally decided by the entry of a final judgment after the majority of the members had voted to approve the judgment and had adopted the necessary amendments to the Society's Articles of Association. The question of intervention has therefore become moot.

In any event, intervention was properly denied."

Appellants raise no substantial question in this Court

CONCLUSION

It is respectfully submitted that the motion of appellee, American Society of Composers, Authors and Publishers, to dismiss the within appeal, or to affirm, should be granted.

Respectfully submitted,

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Supreme Court of the United Stafes

OCTOBER TERM, 1959

No. 788

Sam Fox Publishing Company, Inc., Et al., Appellants,

UNITED STATES AND AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, Appellees:

ON APPEAL FROM THE UNITED STATES DISTRICT COURT .
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

Pursuant to Rule 16(3) of the Rules of this Court, appellants submit this Brief in Opposition to the Motions to Dismiss or Affirm which have been filed by appellees United States and American Society of Composers, Authors and Publishers.

VI

THE MOTIONS TO DISMISS ARE WITHOUT MERIT

The motions to dismiss filed by appellees assert that this Court has no jurisdiction in this case to review the denial of a motion to intervene as of right under 1. Appellees overlook or ignore the distinction which this Court has drawn between appeals from the denial of intervention as of right, and appeals in which the intervention sought is within the discretion of the court which denied the motion. In Railroad Trainment v. B & O.R.R. Co., 331 U.S. 519, the Court made the distinction crystal clear (at pp. 524-525):

"Our jurisdiction to consider an appeal from an order denying intervention thus depends upon the nature of the applicant's right to intervene. If the right is absolute, the order is appealable and we may judge it on its merits. But if the matter is one within the discretion of the trial court and if there is no abuse of discretion, the order is not appealable and we lack power to review it."

Earlier, in Allen Calculators v. National Cash Register Co., 322 U.S. 137, the Court had explained the reason for the distinction: the Court will require an appeal

¹ It is not surprising that the commentators, without exceptions state that an appeal lies, under the Expediting Act as well as in other situations, from a denial of a notion to intervene as of right. See, e.g., Sterif & Gressman, Supreme Court Practice, p. 37 (2d ed 1954); Wolfsón & Kurland, Jurisdiction of the Supreme Court of the United States, pp. 306-307 (1951); 4 Moore, Federal Practice, p. 102, 106 (2d ed. 1948); 2 Barron & Holtzhoff, Federal Practice and Procedure, p. 235 (Rules ed. 1950); Moore & Levi, Federal Intervention, 45 Yale L.J. 565, 581-582 (1936); 7 Cycloragedia of Federal Procedure, pp. 48-49 (3d ed. 1951).

to be taken from the final decree in the proceeding below if it is requested to review the exercise of discretion by a lower court in denying permissive intervention, under Rule 24(b), because (p. 142) "[t]he exercise of discretion in a matter of this sort is not reviewable by an appellate court unless clear abuse is shown; and it is not ordinarily possible to determine that question except in the light of the whole record."

Nor is there any basis for the suggestion by appellees that a distinction should be made between direct appeals to this Court in antitrust cases and such appeals in other cases. Apart from the fact that there is no apparent reason for such a distinction, it is squarely at odds with the opinion of the Court in Sutphen Estates v. United States, 342 U.S. 19. In that case the Court, declared (at pp. 20-21):

"If appellant may intervene as of right, the order of the court denying intervention is appealable. See Railroad Trainmen v. B & O R. Co., 331 U.S. 519, 524, 32 Stat: 823, as amended, 15 U.S.C. (Sup. II) § 29. It was to resolve that question that we postponed the question of our jurisdiction of the appeal to the hearing on the merits."

The Court's combined citation of the Railroad Trainmen case and the portion of the Expediting Act relat-

Appellees have referred to the Allen Calculators case in support of their position (U.S., pp. 8-9; ASCAP, p. 6), but only to the portion of the opinion which deals with the review of the permissive intervention which had been sought under Rule 24(b). They have neglected to point out that before reaching that question the Court had considered the grounds for appellants' intervention as of right, had found that none of them could be supported, and had expressly recognized that where "as to the intervenor, the action [of the court below] was final," the appeal would be entertained. 322 U.S. at p. 141.

ing to antitrüst appeals (17 U.S.C. § 29) could have meant only that it saw no distinction between appeals taken to this Court under that statute from a denial of intervention as of right in antitrust cases and such appeals under any other statute providing for direct appeals from decisions of district courts. Such appeals might arise, for example, in the other category of cases embraced by the Expediting Act, suits under the Interstate Commerce Act (24 Stat. 379, as amended, 49 U.S.C. § 1 et seq.) in which the United States is a complainant,3 or as did the appeal from the denial of the motion to intervene as of right in the Railroad Truinmen case itself. There the appeal was taken directly to this Court under Section 238 of the Judicial Code of 1911 (28 U.S.C. § 345 (1946 ed.)), which provided for direct appeals under the Expediting Act (both antitrust and interstate commerce cases) as well as from judgments in suits to enforce, suspend or set aside orders of the Interstate Commerce Commission, which was the issue on the merits in the Trainmen case.4.

Moreover, contrary to what appellees suggest (U.S., p. 9; ASCAP, p. 6), there is no indication in the Sutphen Estates opinion that this Court would not have decided the appeal on its merits had the appeal been taken from the order denying the motion to intervene alone. Indeed, the judgment "dismissing" the appeal after the Court considered whether the motion to intervene had been properly denied is entirely in accord with .

The Expediting Act, 32 Stat. 823, as amended, is codified under both 15 U.S.C. § 29 and 49 U.S.C. § 45.

See 331 U.S. at p. 523, and the Jurisdictional Statement (pp. 2, 7) and Brief in Opposition to Motions to Dismiss or Affirm (pp. 2-3) in the Railroad Trainmen case, No. 970, October Term, 1946.

the Court's view that the decision as to whether the appeal was to be allowed turned upon the decision on the merits of the intervention.

Reliance by appellees on United States v. California Cooperative Canneries, 279 U.S. 553, and Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502. is likewise misplaced. The California Canneries case held no more than that the Expediting Act precluded an appeal to a court of appeals by one who had been denied permission to intervehe in a Government antitrust suit. The Court did not deal with the question of . what orders could be appealed to this Court under that statute except to state generally that appeals were to be taken from decrees "which disposed of all matters," . not "from an interlocutory decree". 279 U.S. at pp. 557-558. However, the Court cited Collins'v. Miller, 252 U.S. 364, which expressly recognized that an appeal may be taken from a denial of intervention as of right in one of the situations specifically provided for in Rule 24(a)—where the applicant will be adversely affected by a disposition of property which is subject to the court's control. Id. at pp. 370-371. See also Credits Commutation Co. v. United States, 177 U.S. 311, 316.

The fragmented quotation from this Court's opinion in the Canneries case which appears in the brief of appellee ASCAP (pp. 5-6) is grossly misleading. By joining together two entirely inconnected thoughts, appellee ASCAP would have it appear that this Court declared that no appeal could be taken to this Court from a denial of a motion to intervene in an antitrust suit. In fact, the words "denial of a motion for leave to intervene" which are quoted in the ASCAP brief are found in the following sentence of this Court's opinion (279 U.S. at p. 559):

[&]quot;The purpose of Congress to expedite such [antitrust] suits would obviously be defeated if in the District of Columbia an appeal lay to the Court of Appeals from a denial of a motion for leave to intervene."

The Pipe Line case, of course, was a successful ap-, peal from the denial of a motion to intervene. Appelled United States seeks to distinguish it on the ground that "unlike here, no final judgment on the merits of the [antitrust decree] modification proceeding had been entered prior to the appeal from the order denying intervention or prior to this Court's decision on appeal" (U.S., p. 10). We can discern no rational basis for a distinction which would so qualify the rule heretofore announced by the Court in respect to appleals from denials of motions to intervene. Nor do we understand how it is thought to be significant that the right of the intervenor to participate as a party in the antitrust. proceeding in the Pipe Line case stemmed from the provisions of the decree itsen? Here-like the intervenor in Sutphen Estates, supra-we rely upon the terms of Federal Rule 24(a) to establish a coordinate right to intervene. Just as this Court had jurisdiction fo-construe the terms of the decree in the Pipe Line case and the right asserted by the intervenor thereunder, it has jurisdiction here to construe Federal Rule 24(a) and the right to intervene appellants assert under the rule. Surely, no distinction is warranted between these two sources of intervention as of right. Denial of appellants' requested intervention here was, no less than in the Pipe Line case, "a definitive adjudication, and so appealable." See 312 U.S. at p. 5088

There is no merit in the suggestion of appellee United States (p. 10 & n. 8) that in the Pipe Line case the court that had denied intervention had rendered an "opinion"—but not a "final decree — on the merits of the proceeding in which intervention had been sought, but that the District Court here has rendered a "judgment" on the modification of the consent decree. Mr. Justice Frankfarter, in commenting upon the 'opinion' of the court below in the Pipe Line case, and apparently treating it as a "judgment", stated that this Court would "assume that the district court will

2. Were the question one of first impression -- which Lit is not-orderly procedure and proper appellate practice would both support the principle that an appeal. will-lie from an order of a lower court denying a motion to intervene as of right. Appellants took this appeal from the District Court's order denving the requestedintervention pursuant to Federal Rule 24(a), because they were neither in fact nor in law parties to the proceeding in the court below. As amici curiae, appellants had no right to appeal from the judgment entered by the District Court on January 7, 1960, or to object in any way to the proceedings in the court below. See Jur. St., p. 25. Appellants were required to achieve the status of parties before they could voice any effective objection; and the California Canneries case, supra, makes clear that, there is no tribunal other than this. Court to which appellants can turn for this purpose. In the words of this Court in the Railroad Trainmen case, supra, "since [the intervenor as of right] cannot appeal from any subsequent order or judgment in the . proceeding unless he does intervene, the order denying intervention had the degree of definitiveness which supports an appeal therefrom [citing the Pipe-Line case, supra]"...331 U.S. at.p. 524.

adjust the right which belongs to the intervenor with full regard to that public interest which underlay the original suit." 312 U.S. at p. 509. The District Court below could no doubt take similar action were this Court to hold that appellants here should have been permitted to intervene under Federal Rule 24(a). If appellants are permitted to intervene under Federal Rule 24(a). If appellants are permitted to intervene, it will become appropriate for the District Court to entertain a motion—made by appellants or perhaps by the United States—to vacate the judgment of January 7, 1960, and to conduct further proceedings to modify the antitrust degree. This procedure would dispose of the contention of appellees (U.S. p. 8; ASCAP, p. 7) that the question of intervention has become moot.

THE MOTIONS TO AFFIRM SHOULD BE DENIED

Appellees, in undertaking to foreclose full consideration of this appeal, rely upon unfounded assumptions and upon unwarranted fears as to what might occur in this or other antitrust suits if appellants were permitted to intervene. Appellees do not challenge, in any real sense, the substantiality of the questions appellants have raised.

1. Appellee United States asserts that appellants would have the "power to veto entry of any consent judgment" were they granted the right to intervene in the proceeding below (U.S., p. 11). Although the assertion is not explained, nor is any authority cited, it appears to rest upon appellee's assumption that any modification in the 1950 judgment was dependent upon the consent of the parties. This assumption is unfounded for several reasons.

First, the United States, with the consent of the defendants, expressly reserved in the 1950 decree-full power to apply to the District Court for modifications of the judgment in any respect. Article XVII of the decree provides (R. 123):

Appellee ASCAP apparently relies upon the same assumption, although its position on the question is not clear. It states, somewhat obliquely, that the District Court was of the view that it could not compel any party to consent to a judgment other than the one presented on consent, nor could it do so 'indirectly, without hearing evidence' (ASCAP, pp. 5-6). This does not, however, inform us of appellee ASCAP's views as to whether the 1950 judgment or whether the somet below could have ordered a Government could have sought a contested modification of the modification over the objection of the parties.

Covernment could have sought a contested modification of the 1950 judgment or wastner the court below could have ordered a modification of the parties.

"Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Amended Final Judgment to make application to the Court for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this Judgment, for the modification thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

'It is expressly understood, in addition to the foregoing, that the plaintiff may, upon reasonable notice, at any time after five (5) years from the date of entry of this Amended Final Judgment apply to this Court for the vacation of said Judgment, or its modification in any respect, including the dissolution of ASCAP (and at any time within two (2) years from said date apply to this Court for the vacation or modification of Section C(C) hereof).

Modification resulting from the procedures contemplated by Article XVII—an evidentiary hearing on the issues raised by the proposed modification—would not be subject to veto by appellants, were they permitted to intervene, any more than it would be subject to veto by ASCAP itself. The Government makes no reference to this Article in its motion.

Second, and even apart from the express, agreed to reservation of power in Article XVII, the District Court would probably have the power, after an evidentiary hearing, to order a modification of the 1950 judgment, even over the objections of the parties. That the order was entered by consent is no bar to this procedure. Hughes v. United, States, 342 U.S. 353, 357-358; Liquid Carbonic Corp. v. United States, 350 U.S. 869. This, indeed, has been the interpretation of these

decisions by the Department of Justice itself. See Hearings Before the Antitrust Subcommittee (Subcommittee No. 5) of the House Committee on the Judiciary, 85th Cong., 2d Sess., ser. 9, vol. 3, pp. 3748-3749 (1958); and Subcommittee No. 5, House Committee on the Judiciary, Report on "Consent Decree Program of the Department of Justice", dated January 30, 1959, pursuant to H. R. Res. 27, 86th Cong., 1st Sess., pp. 5, 293. Yet there is no reference to these decisions in the brief of appellee United States. While we recognize that the construction by the Department of Justice of the Hughes and Liquid Carbonic cases is open to challenge," it is apparent that it presents a substantial question of law which should not be summarily decided by the Court.

 ⁸ Cf. Dabney, Antitrust Consent Decrees: How Protective an Umbrella?, 68 Yale L.J. 1391, 1394 (1959).

Indeed, it was also open to the United States to proceed by way of a request for an order interpreting the existing 1950 decree to require ASCAP to revise it implementation thereof. In such a proceeding, the United States could properly have insisted that the revision was required by ASCAP's non-compliance with the Government's interpretation of the existing language of the decree. The District Court would have had the power to enforce the Government's interpretation of the decree; ASCAP's interpretation of the decree, or its own interpretation. Cf., Sigmund Timberg (who represented the Government in the 1950 decree negotiations), The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment, 19 Law & Cont. Prob. 294, n.2 at pp. 294-295 (1954):

The District Judge who entered, the judgment in conformity with the prevailing practice, gave no indication of the legality or illegality of ASCAP's past organization or contemplated reorganization, or of its old or new practices. The interpretation of the document, at any moment of time, is for the current officers of the Department of Justice and the then legal representatives of ASCAP and, in the event of their disagreement, for the Federal District Court for the Southern District of New York.

2. Appellee United States, in seeking to show that appellants' interest was adequately represented by the Department of Justice in the court below, does not take issue with the specific grounds upon which appellants rest their claim of inadequate representation (Jur. St., pp. 16-20). The Government does not dispute appellants' contentions that the judgment of . January 7 leaves control of the Society's voting and royalty distribution, and of the conduct of the survey of performances, in the hands of the same dominating publishers as in the past. Appellee relies instead upon generalized statements contained in other cases that the Attorney General is "the guardian of the public interest" and upon the assertion that the administration of the antitrust laws will be adversely affected if appellants are permitted to intervene (U.S., pp. 15-19).

Appellants' requested intervention in the Department's reopened proceeding against ASCAP differs basically from the intervention which has been sought by private parties in other Government antitrust proceedings (Jur. St., pp. 21-22). This proceeding against the Society concerns only the competitive rights under the antitrust laws of ASCAP members inter sese. Appellants are members of the only economic group-the ASCAP membership-on whose behalf the Government purported to act in negotiating a modification of the 1950 judgment with the Society's Directors. Accordingly, in this suit "the public interest" does not call for the Attorney General "to bring about a feasible accommodation of producer, consumer, and other interests" (U.S., pp. 15-16). Rather, as explicitly stated in the 1950 judgment, the "public interest" calls for the Attorney General to achieve "a democratic administration of the affairs of defendant ASGAP" (R. 119).

General references to the guardianship of the Attorney General cannot conceal the substantial character of the question whether appellants' interest has not been inadequately represented. Neither the Court nor appellants have been advised how it is consistent with their rights, or with the "public interest", to insist that appellants be satisfied with "some improvement, even if slight" (U.S., pp. 4, 12; ASCAP, pp. 12-13) over the prior situation.

3. The fears of appelled United States that granting: appellants' requested intervention would adversely affeet the Government's administration of the antitrust laws are unwarranted. Allowing intervention by appellants in the proceeding in the court below would decidedly not "open the door to a multitude of intervenors, each clothed with power to introduce evidence, inject additional issues, and exercise right of appeal" with a "resulting proliferation of appeals" (U.S., p. 16 & n.12). Intervention in the circumstances of this suit, as we have indicated (Jur. St., pp. 21-22), differs fundamentally from intervention that has been sought in every other Government antitrust case we have been able to discover. . Moreover, appellants have not sought, to "inject additional issues" in the proceeding below; they seek only to urge and support by evidence their positions on questions already raised by the proposed modification of the 1950 judgment that had been negotiated by the Department of Justice and the Society's Directors. Now would there be a "proliferation of anpeals"; if there were any appear at all after a proceeding in which appellants had participated, it would be the single appeal to this Court under the Expediting Act.

4. It is evident that there is a broad area of difference between the parties to this appeal as to whether appellants are bound by the District Court's judgment of January 7, 1960. Appelled United States urges that, "[W]ith respect to any claim or cause of action which appellants may have against ASCAP, the judgment is not res judicata and appellants are not bound by the judgment" (F.S., p. 13).

This issue has already been considered at length in the Jurisdictional Statement (pp. 26-29). There is, to say the very least, a substantial question raised by appellants' claim that they are forcelosed from asserting that actions taken by the Society's Board of Directors pursuant to the terms of the judgment-the system of voting there provided, the conduct of the survey, the method of distributing royalty revenues inflict, upon them and other smaller members of a ASCAP unlawful competitive injury that violates the antitrust laws. An ASCAP member seeking to challenge under the antitrust laws any practices, provided for or permitted by the judgment would, we submit, confront the defense that he is estopped from asserting such claims because, as a member of the Society, he was represented in the proceeding in which the judgment was entered, is bound by the judgment, and must therefore abide those practices. Were the ASCAP member .. to reply that he was not adequately represented in the prior Government antitrust proceeding, the rejoinder: would certainly be that that was a matter for determinution in the proceeding brought by the United States—the issue which appellees would now foreclose. The suggestion that appellants be remitted to their

right to bring private antitrust suits (U.S., pp. 16-17) is thus but a hollow promise.10

CONCLUSION

There can be no reasonable doubt that the Court has jurisdiction of the appeal, and that it should be considered on its merits. These merits, as is evident from the discussion supra, raise substantial questions of importance in the administration of the antitrust laws and of Rule 24(a) of the Federal Rules of Civil Procedure, which should not be decided without plenary briefs and

"Appellee United States is, in addition, in error when it asserts that sappellants do not consider themselves . . , bound by the judgment," (U.S., p. 13 & n.11). The state court action referred to in appellee's brief marks an attempt by ASCAP members to compel the Society's Board of Directors to adhere . in their voting and other practices to the laws of New York state to which ASCAP is subject. Indeed, the ASCAP members bringing suit acknowledged the binding effect of the antitrust decree upon them as members of the Society and upon the Society itself. They allege, however, that in certain respects the New York courts may interpret state law as regulating more strictly than the federal antitrust statutes the competitive relations of ASCAP members among themselves. The state court action seeks, further, to compelthe Society's directors to account under state law for the manner in which they have distributed ASCAP's license revenues. See opinion by Mr. Justice McGivern on February 14, 1958, NY Sup Ct., in Lengsfelder, et al. v. Cunningham, reprinted in New York Law Journal, p. 7. February 18, 1958. The theory of the Lengsfelder case, which has not yet been decided, is thus no more than that ASCAP members are not precluded by the antitrust decree from enforcing any state-created rights they may have against those who dominate the Society when the state laws grant broader protections than the federal statutes

argument. Both motions of each appellee should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 56

SAM FOX PUBLISHING COMPANY, INC., ET AL. Appellants,

v.

UNITED STATES AND AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS SAM FOX PUBLISHING COMPANY, INC., ET AL.

OPINION BELOW

The District Court wrote no opinion. The record contains the court's statement denying appellants' motion to intervene (R. 295-296), and the court's order to that effect (R. 489).

For the convenience of the Court, appellants have lodged with the Clerk copies of the Hearings before Subcommittee No. 5, Select

The printed record is referred to herein as "R. ——." The record in the District Court which has been transmitted from the court below but not printed is referred to herein as "DR. ——."

JURISDICTION

A suit was brought by the United States against appellee American Society of Composers, Authors and Publishers (hereafter referred to as "ASCAP" or "the Society") and others on February 26, 1941, charging violations of Section 1 of the Act of July 2. 1890, 26 Stat. 209, as amended, 15 U.S.C. Sec. 1 (Sherman Act) (R. 8). On March 4, 1941, the District Court entered a final sudgment by consent (R. 27). On March \$1, 1950; the judgment was amended, again by consent (R. 35). Upon motion of the United States. the District Court on June 29, 1959, ordered that a hearing on a Proposed Consent Further Amend Final Judgment (hereafter referred to as "proposed order") be held on October 19, 1959, at which plaintiff and defendant were to show cause why the court should approve the proposed order (R. 75). On that day the District Court denied appellants' motion to intervene in the proceeding (R. 295-296) and its order to that effect was entered on November 16, 1959 (R. 489). Notice of appeal to this Court was filed on January 14, 1960 (R. 714).

On May 23, 1960, this Court entered an order directing that further consideration of the question of jurisdiction be postponed to the hearing of the case on the merits (R. 719). Appellants believe that jurisdiction to entertain this appeal is conferred on this Court by Section 2 of the Expediting Act of February 11, 1903.

Committee on Small Business, House of Representatives, on the "Policies of ASCAP," 85th Cong., 2d Sess., pursuant to H.R. Res. 56 (March, April 1258) (hereafter referred to as "ASCAP Hearings"); and the report of the Subcommittee, H.R. Rep. No. 1710, 85th Cong., 2d Sess. (1958) (hereafter referred to as "Hearing Report")

32 Stat. 823, 15 U.S.C. Sec. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989.

STATUTES AND BULES INVOLVED

Section 2 of the Expediting Act, codified at 15 U.S.C. Sec. 29 and 49 U.S.C. Sec. 45, reads:

"Appeals to Supreme Court.

"In every civil action brought in any district court of the United States under sections 1-7 and 15 of Title 15, chapters 1, 8, 12, 13 and 19 of [Title 49], or any other Acts having a like purpose that may be hereafter enacted, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court: (Feb. 11, 1903, ch. 544, § 2, 32 Stat. 823; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1467; June 9, 1944, ch. 239, 58 Stat. 272; June 25, 1948, ch. 646, § 17, 62 Stat. 989.)

Federal Rule of Civil Procedure 24 reads in relevant part:

- "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: ...(2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action: ...
- (c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

QUESTIONS PRESENTED

- 1. The preliminary question of jurisdiction is whether an order of a district court denying a motion to intervene as of right filed pursuant to Federal Rule 24(a)(2) in a proceeding which is part of an antitrust suit brought by the United States may be appealed to this Court as a "final judgment" under Section 2 of the Expediting Act, 15 U.S.C. Section 29.
- 2. The substantive question is whether, in a proceeding brought by the United States to modify a judgmentpreviously entered by consent in an action under the Sherman Act in order to strengthen parts of the judgment designed to protect the smaller members of an unincorporated association of music writers and publisher's from unlawful injusy by the dominating members of the association, some of the smaller members of the association were entitled to intervene under Rule 24(a)(2), for the purpose of securing changes in the proposed modification of the judgment which were necessary for their protection from the dominating members, upon the ground that their interest was inadequately represented by the existing parties to the proceeding—the Department of Justice and the association's Board of Directors-and that they would be bound as association members by any judgment entered in the proceeding.

STATEMENT

This appeal is taken from the denial by the District Court of appellants' motion to intervene in a proceeding brought by appellee United States to modify an antitrust consent decree against appellee ASCAP and others. The antitrust suit was begun almost 20 years ago—on February 26, 1941. An understanding of this

latest proceeding, and the nature and purpose of appel lants' motion to intervene therein, requires a summary of the prior events and proceedings in the suit.

Prior Froceedings in the Government Suit

ASCAP is an unincorporated association of approximately 6,400 writers and publishers of musical compositions, of whom appellants are three of the publisher members. The members grant to the Society a non-exclusive right to license the public performance of copyrighted musical works that they have composed or published. The Society's revenues are derived from idease fees paid to it by those whom it has licensed to perform these works, the fees received being-thereafter distributed to the members.

From the outset, the suit by the Government against the Society has been concerned with alleged violations of the antitrust laws involved in two major aspects of ASCAP's operations: (1) ASCAP's dealings with those to whom it licenses the right to perform the musi-

² Appellant Sam Fox Publishing Company, Inc., has been a member of the Society sincl 1924 and is one of the three original serious music publisher members (ASCAP Hearings, p. 334). Appellants Pleasant Music Publishing Corporation and Jefferson Music Company have been members since 1941 and 1945, respectively (R. 295).

ASCAP's Financial Statement for the year ending December 31, 1959 shows that ASCAP collegted during that year, in round numbers, \$30,000,000. After deduction of some \$6,000,000 in expenses and \$1,500,000 payable to foreign performing rights societies, the remaining \$2,500,000 was distributed, pursuant to the Articles of the Society, 50% to the publisher members and 50% to the writer members (R. 125). Income received by each publisher member from ASCAP will vary, but it usually represents from one-third to two-thirds of a publisher member's gross resenue (ASCAP Hearings, pp. 203, 276, 327)

cal works of its members, and (2) ASCAP's internal arrangements with regard to the distribution by it of license fees to its publisher and writer members, and the exercise of control within the Society through the apportionment of voting power among the members (R. 15 et seq.). Only the second aspect of ASCAP's operations was involved in the proceeding in the District Court in which appellants sought to intervene, and only that aspect is relevant to this appeal.

This second aspect of ASCAP's operations—the alleged violations of the antitrust laws arising from the interference by the Society as an unincorporated association with the competitive relations of its members inter sese-was dealt with in the 1941 complaint. Paragraph 15(A), in particular, alleged that as part of a conspiracy and combination to restrant trade and commerce in various types of public performances of music, the defendants, among other things, had undertaken to create the Society as an "instrumentality with a self-perpetuating Board of Directors and to vest in the wenty-four persons constituting such board the exclusive power to control the activities" of ASCAP (R. 16). The prayer for relief requested that the Society and its officers, agents and members be restrained from (1) electing the Directors other than by a procedure under which all ASCAP members would have the right to vote for their respective representa-

The Society itself and certain of its officers were named as defendants. The latter were charged as defendants in their own right and as representatives of all the Society's members, who were alleged to "constitute a group so numerous that it would be impractical to bring all of them on before the Court by name" (R. 9). See pp. 58-62 below.

tives and (2) from distributing royalties received on performances of the works of its members other than in a "fair and non-discriminatory manner" according to certain enumerated, but essentially subjective, attributes of a member's catalogue of works (R. 26) as determined by the Board of Directors (see Art. XIV, Sec. 6, ASCAP Art. of Assoc., ASCAP Hearings, p. 498).

On March 4, 1941, less than a week after the complaint had been filed, a judgment by consent was entered (R. 27-34). In form—though, as later events showed, not in substance—limitations were imposed on the voting and other control exercised in the Society by the dominant group of the largest publisher members who controlled the Board of Directors through their power to elect the directors. Changes were also made in the inequitable system challenged by the Government underwhich the Directors distributed license fees among the ASCAP members, including the publisher or writer members whom they represented on the Board (R. 32-33). These (as well as other provisions of the

In the District Court, appellants repeatedly asserted their willingness to prove that for many years before the inception of the Government suit and through the time of the proceeding in which appellants sought to intervene, the voting system in the Society enabled a combination of the of the largest publisher members and the two largest "serious paie" publishers to elect their representatives to the Board of Discors and thereby to dominate the affairs of the Society and inflict unlawful competitive injury upon the smaller members (e.g., R. 256, 371, 381; see also DR. 1000-1093). This voting control by the dominating publishers, which appellants maintain is perpetuated in the proposed order, bears importantly upon the adequacy of the representation of appellants interest by the existing parties in the proceeding below and is fully treated hereafter in this Brief. See pp. 28-31, 41-47, 1977.

expense of others, and, at the same time, ASCAP has 'weighted', the votes of its members so as to provide that those members who receive the greatest share of its revenues shall also have the largest number of votes. The vice of the system is that it gives those members in ASCAP who receive the largest share of ASCAP's revenues the power to elect the directors of the Society, who, in turn, have the power to establish the rules governing the Society's system of distribution, which, in turn, determines which members shall receive the largest share of the Society's income."

The Proceeding in Which Appellants Were Denied the Right to Intervene

By 1958, the Department of Justice was apparently prepared to move for further relief under its express reservation of a right to do so in Article XVII, referred to supra, p. 8 (see R. 49). At the request of the Society's Directors, however, the Department of Justice instead entered into negotiations with the Society, through its Board of Directors, and ultimately agreed with the Directors upon a proposed order amending the 1950 judgment (R. 49-50). The proposed amendments dealt with the following areas of ASCAP's internal operations:

- 1. The right of ASCAP members to withdraw from ASCAP.
- 2. The requirement that ASCAP scientifically conduct a survey of the performances of the compositions of its members as a basis upon which to make distribution of its revenues to its members.
- 3. The manner in which ASCAP shall make distribution of such revenue to its members.
- 4. The limitation on the extent to which ASCAP may weight the votes of its members.

- 5. The manner in which ASCAP shall assure its members of equal treatment and an adequate opportunity to protect their rights within ASCAP; and
- 6. The obligation upon ASCAP to admit all duly qualified applicants to membership (R. 119-120).

Upon motion of the Department of Justice, the court below on June 29, 1959 (R. 75-76), ordered that a hearing on the proposed amendments be held on October 19, 1959, at which the Department and ASCAP were to show cause why the proposed order should be approved. The court's order further directed that:

"any party or individual who has an interest affected by these proceedings may appear at such hearing and make application to be heard upon the ground that the [proposed order] will not accomplish the antitrust purpose of this suit."

Having been informed that the District Court's order of June 29 would permit ASCAP members other than those constituting the Board of Directors to participate in the October 19 proceeding only as amici curiae, appellants moved pursuant to Rule 24(a)(2) to intervene in the proceeding in order to present proof that the proposed order would not "accomplish the antitrust purpose of this suit," and to urge changes in the proposed order which they considered necessary to protect them and other ASCAP members from the dominating publisher members (R. 251). In support of their motion to intervene, appellants undertook to establish, pursuant to Rule 24(a) (2), that neither the Society's Board of Directors nor the Department of Justice adequately represented their interests in the proceeding as ASCAP members, and that they would be bound by the District

Court's approval of the proposed order. Appellants set forth their views in a Pleading in Intervention filed pursuant to Rule 24(c) (R. 252) and in detailed supporting memoranda containing offers of proof (DR. 259-297, 1074-1144).

Appellants asserted, and offered to prove, that the Board of Directors, who had negotiated the proposed order with the Department of Justice, was comprised of representatives of the dominating publisher members and other publishers associated with them by business dealings or ownership interest. The domination of the Society's affairs by these publishers, to the detriment of the competitive position of its smaller members such as appellants, had made necessary the original 1941 judgment, its strengthening in 1950, and now the further amendments being proposed (R. 368, 371, 380-381; DR. 279-285).* For this reason, appellants maintained, the Directors' interests were exactly antagonistic to theirs, and hence the Directors could not adequately represent appellants' interest in securing protection from the dominating publisher members of the Society through a modification of the 1950 judgment.

To establish that the Department of Justice inadequately represented their interest, appellants analyzed the provisions of the proposed order and pointed out that it effected no substantial change in the existing undesirable situation in the Society with respect to voting control and the distribution of license fees to the members (R. 373-407; DR. 1093-1141). Appellants

⁸ See ASCAP Hearings, pp. 51-52, 214-215; Hearing Report, p. 3; Department of Justice Memorandum of Sept. 2, 1959 filed in the court below in support of the proposed order (R. 119, at pp. 140-141).

proposed to prove, inter alia, that the voting provisions of the order (Section IV) left the dominating publisher members with more than 41 per cent of the total possible vote of the publisher members and with some 50 per cent of the actual publisher member vote as cast and treated as valid in past ASCAP elections (DR. 1093-1109). They likewise offered to prove that Section II of the proposed order, dealing with the ASCAP survey of public performances of music which supplies the information that is the basis for distributions of revenues to the Society's members, failed in any substantial way to require a more accurate and reliable means of securing such information. Particularly was this so, appellants maintained, because the proposed order still permitted information as to whether and for what surpose a work had been performed to be collected by personnel who were controlled by the dominating publishers through their representatives on the Board of Directors (DR. 1110-1124). Further, appellants offered to prove that the formula adopted pursuant to Section III(F) for distributing license feerevenues to ASCAP members gave arbitrary preference largely to the works of the dominating publishers (DR. 1125-1141).

Appellants urged in the court below that these proposed amendments to the 1950 judgment perpetuated fundamental inequities in the competitive relation of ASCAP's members with one another, and that the consent of the Department of Justice to such amendments conclusively established that the Department inadequately represented appellants' interest in securing protection from the dominating members of the Society. Appellants further maintained that they would be bound as members of the Society by any

modification of the 1950 judgment the court would approve.

The District Court, summarily and without findings or opinion, denied appellants' motion to intervene at the opening of the October 19 proceeding and permitted them to appear only as amici curiae (R. 295-296). In the course of the proceeding, however, the court stated three grounds on which it had denied the motion (R. 381-382) and incorporated these grounds in its order of November 16, 1959 (R. 489):

- (a) that appellants were represented by the Society's Board of Directors with their consent because they were members;
- (b) that appellants were not named parties to the antitrust suit against ASCAP and the suit had proceeded to a consent judgment;
- (c) that appellants' interest was represented by the Government in the person of the Attorney General.

After hearing Department of Justice attorneys and counsel retained by the Directors, and after hearing amici curiae, including appellants, the court below ordered that a vote of the members of ASCAP be taken to determine whether or not they approved the proposed order (R. 477). The Society was directed to conduct a ballot in which each member would exercise one vote, as well as a ballot on the weighted vote basis established under the 1950 judgment and the Articles of Association (R. 481).

The results of the membership vote were announced at a further proceeding before the District Court on January 6 and 7, 1960. Of 1092 publisher members who cast valid ballots, 440, or more than 40

per cent, voted against the proposed order; of 4262 writer members who cast valid ballots, 1285, or slightly more than 30 per cent, voted against the order (R. 655). The proposed order, moreover, secured the approval of only slightly more than a majority, 56 per cent, of all the ASCAP members who were eligible to vote, and less than a majority, 47.7 per cent, of all the publisher members eligible to vote (R. 655).

At the close of the proceeding of January 7, the District Court approved the order as originally proposed, with some changes to which the Department and the Society's Director's had consented (R. 590, 659, 667).

SUMMARY OF ARGUMENT

I

There is no foundation for appellees' claim that the Court lacks jurisdiction of an appeal from the denial of a motion to intervene as of right in an antitrust proceeding brought by the United States. The Court has previously ruled that a district court's order denying such a motion is a "final judgment" that may be appealed directly to this Court under Section 2 of the Expediting Act (15 U.S.C. Sec. 29). Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137; Sutphen Estates, Inc. v. United States, 342 U.S. 19; Missouri-Kansas Pipe Line Co., v. United States, 312 U.S. 502. Indeed, this is a jurisdictional

These figures are derived as follows: 5,092 writers and 1,365 publishers—or 6,457 ASCAP members—were eligible to vote (R. 559-560). The number of writer and publisher members voting to approve the proposed order was 3,629, or 56.2 per cent of the 6,457 members eligible to vote. The number of publisher members voting to approve the proposed order was 652, or 47.7 per cent of the 1,365 publishers eligible to vote (R. 655).

rule of general applicability. Brotherhood of Railroad Trainmen v. Baltimore & Ohio R. Co., 331 U.S. 519.

II

The showing made by appellants in the District Court fully satisfied the requirements for intervention as of right pursuant to Rule 24(a)(2). Neither of the two existing parties to the proceeding in the court below—the Society represented by its Directors, and the United States represented by the Department of Justice—adequately represented appellants' interest and the interest of the ASCAP general membership in securing protection from anti-competitive activities of a dominating group of the largest publisher members.

The publisher members of the Society's Board of Directors have for many years been comprised largely of representatives of a group of the largest publishers who have controlled the voting and the affairs of the Society to the injury of the ASCAP general membership. This domination of the Society by the largest publishers, to the injury of the smaller members of the Society such as appellants, was one of the two violations of the antitrust laws alleged in the suit. brought by the United States against the Society and its members in 1941; it was a basis upon which the Department of Justice sought further antitrust relief in the 1950 amendment to the 1941 consent judgment; and it was the primary basis asserted by the Department for the proposed order modifying the 1950 judgment that was before the District Court in the proceeding below. In negotiating the proposed order with the Department, the Directors of the Society, because of their interest in continuing as much as possible the domination of the Society by this group of

largest publishers, had an interest exactly antagonistic to that of appellants. Hence, the Directors could not adequately represent appellants' interest in securing protection from those same dominating publishers through a modification of the 1950 judgment.

The interest of appellants was likewise not adequately represented by the Department of Justice. Appellants made a showing in the District Court that was sufficient to establish that the proposed order amending the 1950 judgment which the Department of Justice had agreed to with the Directors would be . wholly inadequate either to eliminate the control by the dominating publishers of the voting and the affairs of the Society, or to secure protection for the ASCAP general membership from the anticompetitive activities of these publishers. Appellants, moreover, were members of the only group—the ASCAP general membership—on whose behalf the Department of Justice purported to act in sponsoring the proposed order. In these circumstances, the fact that the Government was one of the parties, and that the Attorney General traditionally represents "the public interest," provided no basis for denying the intervention sought by appellants. Kaufman v. Societe Internationale, 343 U.S. 156; United States v. Reading Co., 273 Fed. 348, modified and affirmed, Continental Insurance Co. v. United States, 259 U.S. 156.

3

Appellants satisfied the further requirement of Rule 24(a)(2) that one who seeks to intervene must be bound by a judgment in the proceeding. Irrespective of whether the suit by the United States against the Society and its members is considered to be a representative action under Rule 23(a) of the Federal Rules or a suit against the Society as an "entity" under

Rule 17(b), any judgment entered, such as the proposed order modifying the 1950 judgment, has a resjudicata effect upon the ASCAP general membership, including appellants. Such a judgment bars the ASCAP members from seeking further protection under the antitrust laws from the anticompetitive activities of the dominating publishers; their rights in this respect have been determined in the proceeding brought by the United States. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356.

III

Although the matter is not clear, the District Court and appellee United States appear to have opposed the intervention sought by appellants in part upon the belief that, as parties, appellants could veto adoption of any modification of the 1950 judgment. This is incorrect. A modification of the 1950 judgment may be sought by the United States and, after appropriate notice and hearing, ordered by the District Court over the objection of the Society or of the appellants were they permitted to intervene. Such power is reserved by the express terms of the 1950 judgment itself. But even if it were not, a district court has inherent power to order a contested modification of any antitrust consent judgment it has previously entered. Hughes v. United States, 342 U.S. 353; Liquid Carbonic Corp. v. United States, 350 U.S. 869; see also System Federation v. Wright, No. 48, October Term, 1960, decided January 16, 1961.

ARGUMENT

I

A DISTRICT COURT'S ORDER DENYING A MOTION TO INTER-VENE AS OF RIGHT IN AN ANTITRUST PROCEEDING BROUGHT BY THE UNITED STATES MAY BE APPEALED DIRECTLY TO THIS COURT AS A "FINAL JUDGMENT" WITHIN THE MEANING OF THE EXPEDITING ACT

Appellees challenge the jurisdiction of this Court to review the denial of a motion to intervene as of right under Rule 24(a). They assert that the denial of such a motion to intervene is not a "final judgment" of a district court which may be appealed to this Court under Section 2 of the Expediting Act (15 U.S.C. Sec. 29), and that an appeal lies only from the antitrust decree itself. Since the Court has reserved decision on this question, we address ourselves to it at the outset. We believe that the jurisdiction of the Court is firmly established.

The question of jurisdiction raised by appellees is readily resolved on the basis of the distinction which this Court has drawn, both in antitrust suits and other cases, between appeals from the denial of intervention when it is claimed as of right, and appeals in which the denial of intervention is within the discretion of the trial court. Both types of intervention are recognized in Rule 24. The distinction established by this Court with respect to appeals from orders denying intervention has derived from the essential feature of each type of intervention—one being "as of right", the other "permissive" or discretionary. An appeal is permitted from an order denying intervention of the first type, but not of the second.

This distinction and this rule are forcefully demonstrated by the decision in Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137, an antitrust appeal under Section 2 of the Expediting Act. Allen Calculators, a competitor of the antitrust defendant, had sought to intervene in a district court proceeding in which the Government had opposed the defendant's acquisition of another competitor as violative of an existing decree. Intervention was sought both as of right under Rule 24(a) and as an exercise of the district court's discretion under Rule 24(b). The district court refused intervention on both grounds, and Allen Calculators appealed to this Court under the Expediting Act from the order denying intervention.

The opinion of the Court dealt with the two grounds for intervention separately. In affirming the denial of intervention as of right, this Court sustained its jurisdiction to entertain such an appeal. The Court considered the grounds advanced by Allen Calculators to support its motion to intervene as of right and found them all wanting under Rule 24(a). Nevertheless, the Court expressly recognized, citing another antitrust case, Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, that where "as to the intervenor, the action [of the court below] was final", the appeal from the order denying intervention would be entertained. 322 U.S. at pp. 140-41.

Only thereafter did the Court turn to the appeal from the denial of permissive intervention under Rule 24(b). It ruled that an order denying such intervention was an exercise of discretion by the lower court, and "[t]he exercise of discretion in a matter of this sort", the Court declared, "is not reviewable by an appellate court unless clear abuse is shown; and it is

not ordinarily possible to determine that question except in the light of the whole record." Id. at p. 142.

Another antitrust case, Sutphen Estates, Inc. v. United States, 342 U.S. 19, states the applicable rule concisely, and in terms squarely at odds with the position taken by appellees here (pp. 20-21):

"If appellant may intervene as of right, the order of the court denying intervention is appealable. See Railroad Trainmen v. B. & O. R. Co., 331 U.S. 519, 524; 32 Stat. 823, as amended, 15 U.S.C. (Sup. II) § 29. It was to resolve that question that we postponed the question of our jurisdiction of the appeal to the hearing on the merits." 10

A third antitrust decision, Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, likewise involved a direct appeal from the denial of intervention as of right. This Court found that the authority for intervention as of right sought by the appellant derived from the provisions of the antitrust decree itself. In so ruling the Court must have been of the view that it had jurisdiction to construe the terms of the decree involved in the Pipe Line case and the right to intervene asserted by the appellant thereunder. Surely, therefore, the Court has jurisdiction here to construe

in No significance can be attached to the fact that in the Sutphen Estates case the appeal was taken from the antitrust decree itself as well as from the district court's order denying intervention. This was required, as the Court made clear in the Allen Calculators case, supra, because the appellant sought to have this Court also review the denial of permissive intervention under Rule 24(b). See 342 U.S. at p. 23. There is no indication in the Sutphen Estates opinion that this Court would not have decided the appeal on its merits had the appeal been taken only from the district court's order denying the motion to intervene as of right.

Rule 24(a) and the right to intervene appellants assert under the rule, and no significant distinction is warranted between two such equally compelling sources of intervention as of right. Denial of appellants' requested intervention here was, no less than in the Pipe Line case, "a definitive adjudication, and so appealable." See 312 U.S. at p. 508.

Nor may any distinction be drawn between the appeal taken in the Pipe Line case and the instant appeal on the ground that here the District Court has already approved the proposed order modifying the 1950 judgment against ASCAP. In fact, the lower court in the Pipe Line case had rendered an "opinion" on the merits of the proceeding in which intervention had been sought. In commenting upon the opinion of the court below in the Pipe Line case, and apparently treating it as a "judgment", the Court stated that it would "assume that the District Court will adjust the right which belongs [to the intervenor] with full regard to that public interest which underlay the original suit." 312 U.S. at p. 509. The District Court below could no doubt take similar action were this Court to hold that appellants here should have been permitted to intervene under Rule 24(a). If appellants are permitted to intervene, it will become appropriate for the District Court to entertain a motion-made by appellants or perhaps by the Government-to vacate the judgment of January 7, 1960, and to conduct further proceedings to modify the antitrust decree.

Brief comment is appropriate upon one other antitrust decision of the Court which appellees considered to have some bearing upon the jurisdictional question. United States v. California Cooperative Canneries, 279

U.S. 553. That decision held no more than that the Expediting Act precluded an appeal to a court of appeals by one who had been denied permission to intervene in a Government antitrust suit. The Court did not deal with the question of what orders could be appealed to this Court under that statute except to state generally that appeals were to be taken from decrees "which disposed of all matters," not "from an interlocutory decree." 279 U.S. at pp. 557-558. However, the Court cited Collins v. Miller, 252 U.S. 364, which expressly recognized that an appeal may be taken from a denial of intervention as of right in one of the situations specifically provided for in Rule 24(a)—where the applicant will be adversely affected by a disposition of property which is subject to the court's control. Id. at pp. 370-371. See to the same effect, Credits Commutation Co. v. United States, 177 U.S. 311, 316:

The principles applied by the Court in determining its jurisdiction to hear appeals from judgments denying intervention in antitrust cases are, of course, no more than illustrative of principles generally applied. In Brotherhood of Railroad Trainmen v. B. & O. R. Co., 331 U.S. 519, which is not an antitrust case, the Court stated the general rule (pp. 524-525):

"Our jurisdiction to consider an appeal from an order denying intervention thus depends upon the nature of the applicant's right to intervene. If the right is absolute, the order is appealable and we may judge it on its merits. But if the matter is one within the discretion of the trial court and if there is no abuse of discretion, the order is not appealable and we lack power to review it. In other words, our jurisdiction is identified by the necessary incidents of the right to intervene

in each particular instance. We must therefore determine the question of our jurisdiction in this case by examining the character of the ... right to intervene in the proceeding"

In the Railroad Trainmen case the Brotherhood, a union representing employees of a railroad which operated switching facilities connecting various trunk lines, sought to intervene in a suit by the trunk lines to enjoin the switching railroad and its employees from violating an order of the Interstate Commerce Commission, pursuant to which the trunk lines had used their own editipment and crews in switching operations. The Brotherhood and the switching railroad had entered into an agreement authorizing the latter's employees, rather than those of the trunk lines, to conduct the switching operations.

The Brotherhood had asserted unsuccessfully in the district court that either of two federal statutes conferred upon it an unconditional right to intervene under Rule 24(a). The Brotherhood thereupon appealed directly to this Court under Section 210 of the Judicial Code of 1911, 28 U.S.C. Sec. 47a (1946 ed.), which authorized such direct appeals from "a final judgment or decree" of a district court in suits to enforce, suspend or set aside an order of the Interstate Commerce Commission other than for the payment of money. In holding that the Brotherhood was entitled to intervene as of right, the Court set forth at length the grounds for the distinction between the appealability of orders with respect to the two types of inter-

¹¹ Section 238 of the then Judicial Code (28 U.S.C. Sec. 345) combined into one section the substantive provisions of the Code, including Section 210, that authorized direct appeals to this Court.

vention. The paragraph preceding that already quoted reads (331 U.S. at p. 524):

"Ordinarily, in the absence of an abuse of discretion, no appeal lies from an order denying leave to intervene where intervention is a permissive matter within the discretion of the court. United States v. California Canneries, 279 U.S. 553, 556. The permissive nature of such intervention necessarily implies that, if intervention is denied, the applicant is not legally bound or prejudiced by any judgment that might be entered in the case. He is at liberty to assert and protect his interests in some more appropriate proceeding. Having no adverse effect upon the applicant, the order deny-. ing intervention accordingly falls below the level of appealability. But where a statute or the practical necessities grant the applicant an absolute right to intervene, the order denying intervention becomes appealable. Then it may fairly be said that the applicant is adversely affected by the denial, there being no other way in which he can better assert the particular interest which warrants. intervention in this instance. And since he cannot appeal from any subsequent order or judgment in the proceeding unless he does intervene, the order denying intervention has the degree of definitiveness which supports an appeal therefrom. Pipe Line Co. v. United States, 312 U.S. 502, 508." Footnote omitted.

This language is too plain for any misunderstanding. It fully expresses the Court's view that in a suit in which a "final judgment" may be appealed directly to this Court, a district court's denial of a motion to intervene as of right constitutes such a judgment and will support a direct appeal. The commentators,

¹² The Railroad Trainmen case is significant for the full consideration the Court gave to the question whether an order denying

without exception, are to the same effect. See, e.g., Stern & Gressman, Supreme Court Practice, p. 37 (2d ed. 1954); Wolfson & Kurland, Jurisdiction of the Supreme Court of the United States, pp. 306-307 (1951); 4 Moore, Federal Practice, pp. 102, 106 (2d ed. 1948); 2 Barron & Holtzoff, Federal Practice and Procedure, p. 235 (Rules ed. 1950); Moore & Levi, Federal Intervention, 45 Yale L.J. 565, 581-582 (1936); 7 Cyclopedia of Federal Procedure, pp. 48-49 (3d ed. 1951).

II

APPELLANTS' MOTION TO INTERVENE UNDER RULE 24
(A)(2) SHOULD HAVE BEEN GRANTED

Rule 24(a)(2) provides for intervention as of right—

"when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action;..."

Appellants' motion to intervene (R. 251) alleged that both requirements of the rule were met—that they were inadequately represented in the proceeding to modify the 1950 judgment, and that they would be bound as

a motion to intervene as of right is a final judgment. The reasoning of that case, however, differs in no way from the approach taken by the Court in reviewing under the Expediting Act district court orders denying intervention in Government antitrust suits. Indeed, the Court's combined citation in its Sutphen Estates opinion (see p. 21, supra) of the Railroad Trainmen case and the codification of Section 2 of the Expediting Act relating to antitrust appeals (15 U.S.C. Sec. 29) suggest that the Court saw no distinction between direct appeals taken under that statute from a denial of intervention as of right in antitrust cases and such appeals under other statutes providing for direct appeals from "final judgments" of district courts.

members of ASCAP by any modification the court might order.

In denying appellants' motion, the District Court had before it, in addition to the motion itself, the proposed order modifying the 1950 judgment, together with a memorandum of facts and arguments in support of the proposed order which had been submitted by the Department of Justice (R. 119-146), appellants' Pleading in Intervention (R. 252-258) and two supporting memoranda dated October 13 and October 19, 1959 (DR. 259, 1074), and memoranda in opposition to the motion filed by the Department of Justice and by counsel retained by the Directors of the Society. There was no evidence received or testimony taken in connection with the motion to intervene. Indeed, it was denied without opportunity even for argument (R. 295-296).

In these circumstances, there were no issues of fact before the District Court, and no findings of fact with respect to whether appellants had satisfied the requirements of Rule 24(a)(2). Rather, that court concluded that the claims asserted by appellants were insufficient as a matter of law. That, then, is the issue here. We propose to establish that the claims asserted by appellants fully satisfied the conditions for intervention as of right under Rule 24(a)(2).

A. REPRESENTATION OF APPELLANTS' INTEREST BY THE EXISTING PARTIES IS OR MÂY BE INADEQUATE

The two "existing parties" to the proceeding in the District Court to modify the 1950 judgment were the United States, as plaintiff, and ASCAP, represented by its officers and Board of Directors, as defendant. Appellants recognized that the nature of the proceeding was such that it was incumbent on them to establish that their interest was not adequately represented by either party. We submit that their showing to the District Court, which we summarize below, was fully adequate to meet the requirements of Rule 24 (a)(2).

1. THE LACK OF ADEQUATE REPRESENTATION BY THE SOCIETY'S OFFICERS AND BOARD OF DIRECTORS

The portions of the 1950 judgment that were before the District Court for amendment in the proceeding below were those which dealt with the competitive relations of the Society's members inter sese. In that area there can be no doubt that the Board of Directors of the Society are unable to represent appellants' interest in securing adequate protection from unlawful competitive injury by the dominating publisher members.

The twelve publisher members of the Board have been for many years, and are now, comprised largely of representatives of the largest publishers and other publishers associated with them by business dealings or ownership interest. The control by the large publishers of the distribution of license revenue to publisher members, and to a very considerable extent of the Society as a whole, 18 was achieved initially and

boards, each elected by the publisher members and writer members of the Society, respectively. One "Board" consists of 12 publisher representatives who supervise the distribution of license revenues to publisher members, and the other consists of twelve writers who supervise distributions to writer members. As publisher members, appellants are primarily concerned with the domination exercised by the largest publishers over the publisher "Board" of the Society. Nevertheless, by reason of the business practices that exist in the

maintained in the period before the 1941 judgment through provisions in the Society's Articles of Association empowering the Directors to elect their own successors.14 The 1941 judgment sought to make the Directors accountable to all the ASCAP members by requiring that the right to vote for directors be extended to all the membership (1941 judgment, Art. II(9), R. 32). But because the 1941 judgment permitted "due weight" to be given to the "classification" of ASCAP members, the dominating publishers were able to retain control of the election of the publisher-Directors by apportioning votes according to the revenues each publisher member received from the Society.15 Since the Directors had absolute power to apportion revenues under the Society's Articles of Association as they were interpreted by the Board, the Directors had absolute power to apportion votes.

music industry, under which copyrights are exploited and controlled by the publishers either on assignment from, or as agents for, the writers, the publishers are more influential in the Society's affairs and in its Board of Directors. See ASCAP Hearings, pp. 56-57, 156. Accordingly, the publisher directors exercise a measure of control over the writer directors.

14 For example, Article IV, Sec. 1, which was in effect at the time of the 1941 consent decree, read in part as follows (ASCAP Hearings, pp. 230-231):

"The Government of the Society shall be vested in and its affairs shall be managed by a Board of twenty-four directors. They shall be elected at each annual meeting of the Board of Directors by a two-thirds vote of the entire Board and shall continue until their successors are elected...."

15 Beginning after entry of the 1941 judgment, voting rights were "weighted" among the members of the Society as follows: each publisher member exercised one vote for every \$500 of revenue received during the pear preceding the election to the Board of Directors, and writers exercised one vote for each \$20 of revenue received. ASCAP Hearings, pp. 230, 487.

This situation did not change in any essential respects in the Board's operations under the 1950 judgment and existed at the time of the proceeding in the court below. Under the system of voting in effect under the 1950 judgment, the ten largest publisher members, by the admission of counsel retained by the Society's Directors, held about 63 per cent of the total publisher vote at the time of the proceeding in the court below (R. 178, 219). Indeed, the continued domination by the large publisher members formed one of the grounds upon which the Government itself supported the proposed order amending the 1950 decree. The continued to the proposed order amending the 1950 decree.

¹⁶ Figures showing the revenue received, and hence voting strength exercised, by nine of the 12 dominant publisher members for the years 1951-1958, as computed by appellants from information supplied by the Society's Directors, indicate that the large publishers held comparable voting power during this entire period. See DR. 1090-1094, 1142. The rest of the publisher vote was widely dispersed among the more than 1,000 remaining publisher members.

¹⁷ The Government's memorandum to the District Court in support of the proposed order declared (R. 119, at p. 140):

[&]quot;While 'ASCAP's nominating committee nominates members with different participation in ASCAP's revenues, these men cannot truly represent the members having small participation in the Society's revenues since their election is dependent on the votes of those members having large participation in the Society's revenues. Members having large participation in ASCAP's revenues (less than 5 per cent of the writer members' and less than one per cent of the publisher members) have the power to elect all of the Society's directors. Those having smaller participation in the Society's revenues (more than 95 per cent of the writer members and more than 99 per cent of the publisher members) do not have the combined power to elect a single director."

[.] The Board has complete control of the affairs of the

Nor is there room for doubt that the Directors have in the past acted to further the competitive interest of the dominating publishers to the detriment of the other members of the Society. Numerous illustrations of the Directors' abuse of power are found in the sworn testimony of ASCAP publishers in the ASCAP Hearings conducted in 1958 by a Subcommittee of the House of Representatives Small Business Committee and in the subcommittee's Hearing Report. 18

Hence it was clear that the Society's Board of Directors, composed as it is of representatives of the dominating publishers, had interests which were squarely and necessarily in conflict with those of appellants and other smaller members of ASCAP, and was in no position to represent appellants' interest in securing protection from the dominating publishers through a modification of the 1950 judgment. The slight concessions to the interests of the smaller members of ASCAP which were wrung from the Directors in the proposed order cannot mask their continued interest in retaining, at the expense of the other members, as much control as possible by the dominating publishers over the Society's affairs.

Society. It elects the officers; its members act as the writers and the publishers classification committees; it appoints all other committees; it is in large measure self-perpetuating for it elects the committee which has the power of nominating candidates for the Board of Directors."

¹⁸ ASCAP Hearings, pp. 26-31, 34, 70, 83, 109-118, 148-149, 328, 341-346; Hearing Report, pp. 5-7. See also Government Memorandum of September P. 1959 (R. 119, at pp. 142-144). The same conclusion is reached in a report to the congressional subcommittee from its staff which was before the court below in the October 19 proceeding and which is part of the record in this appeal (DR. 1069-1073).

The reaction of the District Court to this showing by appellants is not clear. The court does not appear to have concluded that the Board of Directors could or would in fact represent the interest of appellants, but rather to have decided that appellants were barred from raising any such objection. The court first stated that because appellants were members of the Society, they had Etherefore surrendered [their] right to intervene as individuals" (R. 295). Later the court restated this ruling as follows (R. 381):

"I denied you the right to intervene first, because you were represented by the Society, and by the Society with your consent, you having become a member of it."

The final order (R. 489) is to the same effect: "Having found . . . that applicants are members of and are represented by the Society with their consent"

These statements suggest that the court may have been of the view that in no circumstances could appellants-or, indeed, any other ASCAP members-establish that they were inadequately represented by the Society's directors. If this was the court's position, we submit that it is at odds with a long line of decisions which grant to a member of a group which is a party to a suit the right to intervene to protect his interest when it will not be protected by those who would normally be expected to do so. Persuasive authority is found in the field of corporate law, where intervention as of right by a shareholder has been authorized on the ground that the corporation, a party to the suit, was in the control of the opposing party or others whose interest was antagonistic to that of the shareholders. In Park & Tilford Co. v. Shulte, 160 F. 2d 984 (2d Cir.

1947), certiorari denied, 332 U.S. 761, a shareholder was permitted to intervene to recover "insider" profits from trading in the corporation's stock by its officers who were the defendants in the action and who controlled the corporation. Intervention as of right by a shareholder was also authorized where the opposing party had obtained control of the corporation during litigation that had been commenced by the corporation, Golconda Petroleum Corp. v. Petrol Corp., 46 F. Supp. 23 (S.D. Calif. 1942), or where the directors of the corporation in charge of a suit were themselves alleged to have been implicated in the wrongdoing, Pyle-National Corp. v. Amos, 172 F. 2d 425 (7th Cir. 1949). See to the same effect Cuthill v. Ortman-Miller Machinery Co., 216 F. 2d 336 (7th Cir. 1954); Pellegrino v. Nesbit, 203 F. 2d 463 (9th Cir. 1953); Twentieth Century Fox Film Corp. v. Jenkins, 7 F.R.D. 197 (S.D.N.Y. 1947).

Apparently, the District Court would have left open to an ASCAP member who is aggrieved by the Directors' representation of his interest only the path of resigning from the Society. The court suggested that a writer or publisher did not have to remain a member of ASCAP but could withdraw at any time. R. 362-363, 388, 402. Not only does the law not compel such a choice but, as the court below must have been aware, resignation is in fact not feasible for any ASCAP member who hopes to continue to earn his livelihood as a music writer or publisher. alone, individual composers and publishers would be physically unable to detect and prevent infringement of their copyrighted works by those who performed their compositions publicly for profit. This was recognized by the court below in a private antitrust suit brought against the Society. Alden-Rochelle, Inc. v.

ASCAP, 80 F. Supp. 888, 891 (S.D.N.Y. 1948). fact, the futility of individual licensing and enforcement is widely recognized.19 See Finkelstein. The Composer and the Public Interest-Regulation of Performing Rights Licensing Societies, 19 Law & Cont. Prob. 275-278, 284 (1954); BMI, Inc. v. Taylor, 55 N.Y.S. 2d 94, 100 (Sup. Ct. 1945). The two other performing rights societies in the United States, moreover, present no alternative, particularly for a publisher who might desire to withdraw from ASCAP. Both of these societies are corporations that are controlled by special interests. Affiliated Music Enterprises, Inc. v. SESAC, Inc., 160 F. Supp. 865, 870 (S.D.N.Y. 1958), aff'd 268 F. 2d 13 (2d Cir. 1959), certiorari denied, 361 U.S. 831; Schwartz v. BMI, Inc., 180 F. Supp. 322, 326 (S.D.N.Y. 1959).

2. THE LACK OF ADEQUATE REPRESENTATION BY THE UNITED STATES

Before we state the showing made by appellants as to the inadequacy of the representation of their interest by the United States, a preliminary comment is warranted. Appellants appreciate that the United States, acting through the Department of Justice, is by law and tradition the representative of the public interest in Government antitrust suits. This premise, however, does not support the conclusion that private parties can never satisfy the requirements for intervention as of right under Rule 24(a)(2), whatever the nature of the antitrust proceeding in which intervention is sought. There will be times in the field of public litigation, including litigation under the antitrust laws, when the proceeding so unmistakably calls for participation

¹⁹ The Government acknowledged this in the proceeding below (R. 139).

by private parties whose rights will be determined therein that the strongest case is made for the application of Rule 24(a)(2). We suggest that in this sense the Rule provides a fundamental protection to private parties when Government agencies designated by law to protect their rights in fact fail to do so.

Prior decisions of this and other courts illustrate this application of the Rule. In Kaufman v. Societe Internationale, 343 U.S. 156, the position of the Government agency with respect to the interest of the parties seeking to intervene was not unlike that of the Department. of Justice here. The appellants there, non-enemy stockholders of a corporation dominated and controlled by enemy aliens, had been denied intervention as of right in a suit brought by the corporation to recover assets seized by the Alien Property Custodian. appellants contended that they and other non-enemy stockholders were entitled to the return of a portion of the seized assets that represented their untainted investment in the corporation. The management of the corporation and the Alien Property Custodian were both of the view that the interests of enemy and non-enemy stockholders should be treated alike and that the two groups should share in the proceeds of the sale of the seized assets. Influenced by the fact that both the corporate management and the governmental agency had taken positions antagonistic to the non-enemy stockholders, the Court held that intervention should have been allowed under Rule 24(a)(2). See 343 U.S. at pp. 161-162.

Relying in part on the Kaufman case, the Court of Appeals for the District of Columbia has held that parties who would suffer a "practical disadvantage" from judicial reversal of administrative action were entitled

to intervene as of right where there was no "assurance of adequate representation" of their interest by the agency. Textile Workers Union of America v. Allendale Co., 226 F. 2d 765 (D.C. Cir. 1955), certiorari denied, 351 U.S. 909. In that case, intervention as of right was permitted to unions and a manufacturer in an action brought by another manufacturer to review a ruling by the Secretary of Labor fixing minimum wages to be paid workers producing goods under government contract. The union's members would have received increased wages under the Secretary's order and the manufacturer who sought to intervene competed with the plaintiff manufacturer for government contracts but was forced to pay higher wages in the area in which its plant was located. The court, sitting en banc, allowed intervention as of right under Rule 24 (a) (2). 226 F. 2d at p. 768.20 In addition to the Kaufman case, the court relied upon Wolpe v, Poretsky, 144 F, 2d 505 (D.C. Cir. 1944), certiorari denied, 323 U.S. 777, where intervention by private parties under Rule 24(a)(2) was allowed on a showing that the govrnmental agency, a zoning commission, had refused to appeal a lower court's order enjoining enforcement of a zoning ordinance.

Intervention on the ground of inadequate representation has likewise been permitted in Government antitrust suits. In United States v. Reading Co.,

²⁰ Although three of the seven circuit judges sitting in the Allendale case dissented, they did not take issue with the view expressed by the majority that whether intervention should be permitted depended upon the adequacy of the representation of the applicants' interests by the Secretary of Labor. The dissenting judges were of the view that on the facts presented the Secretary adequately represented those interests. 226 F. 2d at pp. 772-773.

273 Fed. 848, 850 (E.D. Pa. 1921), modified and affirmed sub nom. Continental Insurance Co. v. United States, 259 U.S. 156, a proceeding for the formulation of an antitrust decree, private parties were allowed to intervene in circumstances somewhat analogous to those presented here. In that case this Court had found a holding company to be a combination in violation of the antitrust laws. 253 U.S. 26. On remand, the district court allowed various classes of stockholders of the company to intervene as parties in the hearing on relief in order to assure that the decree to be entered disposing of the company's assets would protect their interests. The appeal to this Court challenging the propriety of the decree was taken by several of the intervenors. other antitrust cases, intervention has been permitted by a private party whose existing rights against the antitrust defendant would be destroyed under a decree entered at the request of the Government. See United States v. St. Louis Terminal R.R. Ass'n, 236 U.S. 194, 199; California Co-Op Canneries v. United States, 299 Fed. 908, 912-913 (D.C. Cir. 1924), reversed on other grounds after further proceedings, 279 U.S. 553; see also United States v. Swift & Co., 286 U.S. 106, 112.

Appellants' claim of inadequate representation of their interest by the Department of Justice in the proceeding below is grounded upon a showing substantially more compelling than that made by the intervenors in any of the foregoing decisions. Appellants rested their claim of inadequate representation squarely upon the unique nature of the antitrust proceeding in the court below. That proceeding concerned solely the competitive rights under the antitrust laws of the ASCAP

members among themselves. Appellants were members of the only economic group—the ASCAP general membership—in whose interest the proceeding was brought. The relief which was necessary was that which would effectively protect the ASCAP general membership from the continued unlawful competitive injury by the dominating members of the Society which the 1950 judgment had proved inadequate to prevent (R. 49, 119).

The inadequacy of the representation of appellants' interest, moreover, was in no sense speculative. The extent to which the Government proposed to protect their interest against the unlawful competitive injury that was being imposed was made explicit in the agreement that the Government had negotiated with those whose activities were to be curbed, and which it urged the District Court to approve. Yet, as appellants claimed in the District Court and as we show below (pp. 41-53), the modification of the 1950 judgment for which the Government sought approval will achieve no substantial change in the voting and other anticompetitive controls exercised in the Society by the dominating members.

These key facts serve to distinguish appellants' position from that of prospective intervenors who have been denied intervention in other Government antitrust proceedings. These decisions usually have involved attempts to intervene by customers, licensees or competitors of the antitrust defendant, and such parties have been held to have no better standing to intervene than a member of the general public. E.g., United States v. General Electric, 95 F. Supp. 165 (D. N.J. 1950); United States v. Bearing Distributors, 1955, Trade Cas. I 68,242 (W.D. Mo. 1955); cf. United States

v. Radio Corp. of America, et al., CCH Trade Cas. 169,774 (E.D. Pa. 1960), appeal dismissed sub nom. Westinghouse Broadcasting Co. v. United States, 5 L. Ed. 2d 264 (Dec. 19, 1960). Or they have been cases in which the party seeking to intervene was attempting to aid his private litigation against the antitrust defendant, or to seek relief unrelated to that sought by the Department of Justice. See United States v. Bendix Home Appliances, 10 F.R.D. 73 (S.D.N.Y. 1949); United States y. Loew's, Inc., 1957 Trade Cas. 168,656 (S.D.N.Y. 1957); United States v. Radio Corp. of America, 3 F. Supp. 23 (D. Del. 1933).21

Appellants' motion to intervene presented a wholly different situation. Appellants, as members of the Society, were not simply one of the general public whom the Government's proceeding was designed to

An earlier unsuccessful attempt to intervene in this proceeding—United States v. ASCAP, 11 F.R.D. 511, 513, (S.D.N.Y. 1951)—has no bearing at all on the issues presented by this appeal. The applicant-intervenor there was not, and had never been, an ASCAP member and was seeking to litigate in the Government antitrust suit his private dispute with the Society.

In 1956, the court below denied motions by other members of the Society to intervene in the litigation. See United States v. ASCAP; 1956 Trade Cas. [68,524 (S.D.N.Y. 1956). In that instance, the parties seeking to intervene had presented their complaints against the Society's Directors to the Department of Justice only shortly before filing their motion, and the Department was investigating the complaints at the time. See letter of then Assistant Attorney General Hansen, ASCAP Hearings, p. 142. At that time, there could be no showing of a lack of representation by the Government of the prospective intervenors' interest. Here, on the contrary, the proceeding in which appellants sought to intervene was the final judicial stage of a three-year investigation, after which the Department decided to sponsor a modification of the 1950 judgment which did not protect the interest of the Society's smaller members.

protect. Nor were they seeking to further any private litigation with the Society. Rather, they sought to assert adequately the very rights which the Government was purportedly enforcing solely on behalf of the ASCAP general membership. And they sought to request specific relief only with respect to those matters as to which the Government's agreement with the Directors was plainly inadequate to protect the membership from the dominating publishers.²²

The question whether appellants' interest was adequately represented by the Government cannot theretore be answered by recitation of the truism that the Attorney General is "the guardian of the public interest." Appellants' claim of inadequate representation by the Government is more properly tested by inquiring whether the position taken by the Government in sponsoring the proposed order will achieve a major antitrust purpose of the suit against the Society and a purpose in which appellants have a deep interest-"a democratic administration of the affairs of defendant ASCAP" (R. 45). The proof which appellants were denied the opportunity to adduce in the proceeding below-indeed, the facts which the Government itself represented to the court and the admissions of counsel retained by the Society's Directors-make it plain that the Government had embraced a modification of the 1950 judgment which would surely not achieve a "democratic administration," of the Society, nor even in any substantial way reduce the control of the dominating members. Consideration in some detail of two essential provisions of the proposed order, one of which goes to the heart of the Government's original attack

^{· &}lt;sup>22</sup> Compare appellants' Pleading in Intervention (R. 252-258) with provisions of the proposed order set forth at R. 668, 670, 674.

upon the control exercised by the dominating publishers, will demonstrate the inadequate representation by the Government of the interest of appellants and the other smaller members of the Society.

a. The System of Voting-Section IV

Section IV of the proposed order, which deals with the election of Directors, most clearly evidences the inadequate representation of appellants' interest by the Government. In the memorandum submitted to the District Court in support of the proposed order (R. 119 et seq.) the Department of Justice, apparently referring to the dominating members of the Society, asserted that it was one of the antitrust purposes of the suit "to make it impossible for certain members to use the Society to obtain an unfair advantage over their competitors"—a purpose which "ASCAP's present rules frustrate" (R. 139-140). Yet Section IV of the proposed order continues the weighted voting system permitted by the 1950 judgment, and in a manner which insures that the dominating publishers and their affiliated members will retain the same control of ASCAP as they have had in the past.

Under the system of voting in effect under the 1950 judgment, as we have pointed out above, pp. 29-30, the ten largest publisher members of ASCAP held about 63 per cent of the total publisher vote (R. 178, 218). Under the proposed order, the ten largest publishers (and their affiliated members)²³ would be able to

²³ An "affiliated publisher member" is defined by the ASCAP Articles of Association as follows (Art. IV, Sec. 1, Par. 4):

[&]quot;By the expression 'affiliated' is meant a group of two or more publishing businesses controlled through stock ownership by any one of such group or all of which are either

exercise up to approximately 41 percent of the total publisher vote (R. 149, 177; 188, 218).24

Counsel retained by the Society's Directors in the negotiations with the Department of Justice and in the proceeding below acknowledged that the initial voting strength of these publishers would be approximately 37 percent of the total publisher vote (R. 177, 218, 465). But Section IV(C) of the decree permits a ten percent increase in the vote of the ten largest pub-

directly or indirectly controlled by any other person, copartnership, firm, association or corporation."

See ASCAP Hearings, p. 483. In recognition of the ownership control that may be exercised by the same persons over a group of affiliated publisher members, Article IV, Sec. 1, bars from "election to the Board of Directors as a publisher member thereof, more than one representative from any group of affiliated publishers." The ten largest publisher members have a large number of "affiliated" members whose votes they control (R. 272-276; see also R. 279-283).

All voting figures referred to hereafter are those that have been supplied at one time or another by the Society's Directors. No other figures were available to appellants, and apparently none have been obtained independently by the Government, despite its power under the 1950 decree to inspect the Society's books and records (R. 46-47).

²⁴ The form of the prior system, under which the number of votes that a member could cast was determined by the revenue he received (see p. 29 n. 15, supra), is changed under Section IV of the proposed order, which provides for votes to be determined by the "performance credits" that the member receives under a formula requiring progressively more credits for each additional vote. Sec. IV(B)(1) and (2), R. 674-675. A "performance credit" may be defined as a value assigned to any particular use of a work which is reported in the Society's survey of performances of its members" works. See Sec. (A)(8) of the "Weighting Rules" included as Attachment C to the proposed order, R. 690.

lishers over the voting strength that was initially held by them at the time the proposed order goes into effect (R. 675).25 Because the new weighted voting formula of the proposed order is in the form of a graduated scale that progressively increases the number of performance credits a member must have for each vote (R. 675), and because the ten largest publishers actually consist of 73 affiliated publisher members (R. 272-276), these publishers may increase their total-vote by the permitted ten percent above 37 percent simply by assigning works among their affiliated members so that each affiliate will hold the lowest possible number of performance credits.26 lants suggest that this bloc of 41 percent of the total publisher vote is more than sufficient to permit the largest publishers to continue to thwart one of the antitrust purposes of the suit-"to make it impossible

²⁵ No statement has ever been made by either the Government or the Society's Directors explaining the purpose behind this provision that permits a 10 per cent increase in the vote of the ten largest publishers.

²⁶ The likelihood that this redistribution will occur is suggested by a comparison of the second and third largest publishers in 1958, the Chappell and the Robbins groups. These publishers consist of 19 and 9 affiliated members, respectively (R. 274-275, 276). Although the aggregate performance credits of these two publisher groups were substantially identical in 1958 (R. 272), counsel retained by the Society's Directors declared that under the 1960 decree the second largest publisher would have 393 votes while the third largest publisher would have only 254 votes (R. 219). At its discretion, therefore, the third largest publisher would be able to increase its votes to approximately those held by the second largest publisher merely by creating additional affiliates or redistributing works among its existing affiliates. For this reason, the provisions of Sections VI(A) and (B) of the proposed order

for certain members to use the Society to obtain an unfair advantage over their competitors" (R. 140).27

The 41 percent figure, however, does not provide a complete picture of the voting power that will continue to be exercised in the Society by the dominating publishers. To this percentage of their total publisher vote must be added those of the two largest publishers of "serious" music ("standard" publishers), who have been directly represented on the Society's Board in the past and who are not among the ten largest publishers. These publishers have frequently held some three percent of the total publisher vote in recent years," and this may be expected to continue since they are not

purporting to fix a ceiling of 100 votes per member (R. 674) are wholly meaningless in their application to publisher members, and can be evaded at will.

Appellants have sought to determine through correspondence with counsel retained by the Society's Directors what percent of the total publisher vote was in fact cast by the ten largest publishers in the recent election for ASCAP Directors held in the fall of 1960. Counsel indicated that the ballots had been sealed and that information of this nature had not been disclosed even to the officers or directors of ASCAP. It is not clear how under such conditions the Society—or, indeed, the Government—intends to assure compliance with the limitations imposed on the votes of the ten largest publisher members by Section IV(C) of the proposed order (R. 675).

²⁷ Cf. United States v. Union Pacific R.R., 226 U.S. 61; North American Co. v. Securities & Exchange Commission, 327 U.S. 686, 692-693, 697; Morgan Stanley & Co. v. Securities & Exchange Commission, 126 F.2d 325, 328 (2d Cir. 1942); United States v. Sears, Roebuck & Co., 165 F. Supp. 356, 359 (S.D.N.Y. 1958).

²⁸ Published information is available from which computations may be made of the percentage of the total publisher vote held by the two largest "serious music" publishers, the Schirmer and

within the overall 41 percent restriction that the 1960 decree imposes upon the ten largest publishers (R. 274-276). The two standard publishers have traditionally allied themselves with the ten largest publishers in controlling the Society's affairs, and no reason can be

Fischer companies, in the period 1954-1958. These publishers are not among the top ten publishers (R. 274-276), but receive substantial revenue distributions from the Society. Of the nine publishers listed at R. 271-272, the seven other than Schirmer and Fischer are among the top ten. Accordingly, Schirmer and Fischer are the two of these nine publishers who received the least revenue from the Society in 1958—\$124,926.50 and \$107,781.04. Since the total publisher revenue distributed for 1958 was \$10,884,149 (R. 265), the combined revenue of Schirmer and Fischer in this year amounted to approximately 2.2 percent of the total publisher revenue. These publishers therefore held this percentage of the publisher vote in that year (see p. 29 n. 15, supra).

Similar computations may be made for the years 1954-1957 based upon information contained in the Record (R. 265) and supplied by the Society's Directors to the Subcommittee of the House of Representatives Small Business Committee, as indicated in the following table:

Year	Total Publisher Distribution (R. 265)	Distribution Received by Schimer and Fischer	of Total Publisher Vote Exercisable by Schirmer and Fischer	
1957	*10,343,563	\$147,091.38 and \$144,331.48	2.6%	
1956	\$ 9,349,302	\$159,442.00 and \$124,389.50	3%	
1955	\$ 8,892,154	\$169,387.45 and \$124,946.63	3.4%.	
1954	\$ 8,715, \$ 55	\$197,210.95 and \$146,406.53	3.9%	

The sources for the figures showing the revenue distributions to the Schirmer and Fischer companies for 1954-1957 are: for 1957, Exhibit No. A6 printed at p. 531, ASCAP Hearings; for 1954-1956, information comparable to that shown in Exhibit No. A6 which was supplied by the House Subcommittee from its files and copies of which have been lodged with the Clerk.

foreseen why they would change in the future. Thus, the votes that will be held by the dominating publishers under the proposed order will be not 41 percent, but 44 percent of the total publisher vote.

One further computation is required to make the picture of voting domination complete. Appellants offered to prove in the District Court that under the proposed order the dominating publishers, including the two largest standard publishers, would hold. some 50 percent of the average vote that has been east and treated as valid in past ASCAP elections. According to figures furnished by counsel retained by the Society's Directors to one of appellants and to the Subcommittee of the House of Representatives Small Business Committee, the publisher votes cast in elections of directors in recent years has been about 88 percent of the total publisher vote. Of the ballots cast, bowever, some two per cent were unsigned or improperly marked, and were discarded, so that in reality only some 86 percent of the total publisher vote, on the average, was counted in the elections of directors (R. 262, 264; ASCAP Hearings, pp. 545-546). Accordingly, the 41 percent of the total publisher vote which the 1960 decree permits the ten largest publishers to retain will, in practice, constitute approximately 47. percent of the average publisher vote that has been cast and treated as valid. When the votes of the two largest standard publishers are added to this 47 percent retained by the ten largest publishers, it is apparent that the proposed order permits the dominating publishers to retain some 50 percent of the . actual publisher vote. The remaining publisher

votes will, of course, continue to be widely dispersed among the 1300-odd remaining publishers.29

Appellants respectfully suggest that they are fully entitled to claim that their interest is not adequately represented by the Government when the latter urged upon the District Court a modification of the 1950 judgment which would permit some 50 percent of the actual publisher vote to be retained by the publishers who have dominated the voting, and thus the affairs, of the Society in the past. The Government submitted the voting proposal in the face of the accusations of its own memorandum in the District Court that this group of . publishers had totally disenfranchised the other ASCAP publisher members (who are their competitors), had perpetuated themselves in office as members of the Society's Directors, had "established a distribution system (for license fees) which has the effect of favoring certain members at the expense of others" (R. 140), and had suppressed competition in the music publishing industry. The Government's position is consistent neither with the antitrust laws, nor with a "democratic administration of the affairs of ASCAP," nor with an adequate representation of the interest of appellants and other smaller members of the Society.30

²⁰ Connsel retained by the Directors of the Society stated that the 36 largest publishers and their affiliates would hold, under the proposed order, just over 50 percent of the total possible publisher vote (R. 218-219). Since the ten largest publishers and their affiliates then held at least 37 percent, this appears to mean that the 26 publishers who are next in size after the ten largest will hold approximately 13 percent or less. The remaining vote will be divided among the other 1300-odd publisher members.

³⁰ The recent election of directors under the voting provisions of the proposed order establish that the largest publishers will continue to dominate the affairs of the Society. Although appel-

b. The Survey of Performances-Section II.

A further inadequacy in the Government's representation of appellants' interest is reflected in Section II of the proposed order dealing with ASCAP's survey of performances of its members' works (R. 668-670). The survey is required by Article XI of the 1950 judgment, which directs the Society to make distributions of license fees to the members "on a basis which gives

lants have been unable to determine the percentage of the vote cast by the largest publishers, these publishers succeeded in re-electing to the Board all of their representatives and the representatives of the two "serious" music publishers who are among the dominating group. The only changes in the composition of the Board were the election of another large publisher, E. H. Morris of the "Morris Group" of affiliates, who is among the ten largest publishers (R. 275-276), and the election of Bernard Goodwin, now a representative of a smaller publisher who had previously served for a number of years on the Board as the representative of one of the largest publishers. See Billboard, December 26, 1960; Variety, December 28, 1960; ASCAP Hearings, p. 335.

Messrs, Morris and Goodwin were elected by means of the "petition procedure" created by Section IV(E) of the 1960 decree (R. 676), under which publisher members holding one-twelfth of the publisher vote may aggregate their votes to elect a director by petition. It is significant that the publisher directors so elected were a representative of one of the ten largest publishers and an individual who had represented another of the ten largest publishers in the past. This is not surprising in view of the fact that, as already noted (p. 47 n. 29, supra), the 26 publishers next in size after the ten largest publishers will hold 13 percent or less of the total publisher vote. These publishers, who are the most likely candidates for a coalition to elect an independent director under the procedure created by Section IV(E), have conflicting economic interests that make it unlikely they would aggregate their votes to achieve the 8,5 percent of the total publisher vote that the section requires. Moreover, included among these 26 publishers are the two largest "standard" publishers, who would not lend their three percent of the publisher vote to any such combination, so that a successful combination by the remaining 24 publishers is even less likely.

primary consideration to the performance of the compositions of the members as indicated by objective surveys of performances . . . periodically made by or for ASCAP" (R. 44). The information supplied by the survey with respect to performances of works on various media forms the basis for distribution of liscense revenues to the Society's members. The Department of Justice memorandum in support of the proposed order asserted that ASCAP did not conduct the "objective surveys" required by the 1950 decree (R. 121-122). Yet the proposed order itself makes no effort to deal with one of the two major reasons for the lack of objectivity.

The survey consists of two distinct operations: first, the collection and collation of information concerning the performances surveyed; second, the application to this information of various mathematical and statistical computations. Section II of the proposed order undertakes only to make the mathematical computations applied in the second step of the survey more accurate. It makes no mention of, and does nothing to correct, the method by which the survey information is originally collected and collated. Obviously, if the original information which is fed to the survey sampling formula is inaccurate or misinterpreted, the most accurate mathematical formula devised can do nothing but compound error. Herein lies the fundamental failure of the Government adequately to represent appellants' interest in securing a survey which would accurately and reliably reflect the performances of the members' works.

Appellants sought to bring before the District Court evidence such as that adduced in the ASCAP Congressional Hearings, where it was disclosed that the entire

method by which ASCAP collects its survey information is inaccurate and unreliable. The Government, although it was aware of such evidence (see R. 121-122) and did not dispute it, nonetheless acquiesced in a continuation of the same procedure. Under the proposed order, as under the 1950 decree, the personnel collecting the survey information will continue to operate on the ASCAP premises under the supervision of Directors controlled by the dominating publisher members who may directly benefit from the manner in which the supervision is exercised.

Moreover, nothing in the proposed order prohibits the Directors from continuing, as they did under the 1950 judgment, to make verbal and subjective interpretations that may, among other things, affect the weight to be given to a particular performance of a work reported in the survey, and that will be made prior to, and independently of, the application of the survey sampling formula itself. The Directors thus retain the power under the proposed order to influence the interpretation of the basic performance data that comprise the source information to which the survey formula is to be applied, and thereby to influence the license fee payments members receive Since the Directors of the Society (R. 384-386). are in effect trustees of the funds collected for all ASCAP members, they are permitted by the proposed order to have a direct conflict of interest resulting from their position as representatives of individual publishers. In fact, as appellants proposed to show in the District Court, an accurate, fair and impartial survey can be secured only through the use of an independent

⁸¹ E.g., ASCAP Hearings, pp. 70-71, 82-84, 427, 429-441.

survey organization which would insulate the system from any possibility of influence or control by any ASCAP member (R. 387-388).

The provisions of the proposed order with respect to voting and the survey of performances provide the clearest indications of the inadequate representation by the Government of appellants' interest. In order not to extend unduly the consideration of this question, we refer only briefly to the portions of the proposed order that fix the distribution by the Society of license revenues to the members for various types of performances of their works reported in the survey. See Sec. III(F), and "Weighting Rules" and "Weighting Formula" (R. 674, 689-694, 704-714). Appellants asserted below that these provisions, which were designed to deal with existing revenue distribution practices of the dominant publishers that the Government itself had complained "put certain members of the Society at a tremendous competitive disadvantage" (R. 119, at p. 137), did not eliminate this disadvantage but rather codified and perpetuated a system of distributing license revenues that would have the effect of continuing to favor the performances of the works of the large publishers (R. 395-399).

The basic inadequacy of this portion of the proposed order lies in the fact that it permits discrimination in the distribution of license revenue between musical works that are reported in the survey as having been performed for the same "use." Under the prior practice, the "competitive disadvantage" permitted one song to "earn" as much as 1000 times more perform-

³² A "use" is defined in the proposed order as "a performance of a composition reported by the ASCAP survey." Weighting Rules, Sec. (A)(6), R. 690.

ance credits than another song when each was used by a licensee of the Society in exactly the same way and for exactly the same amount of time (R. 137). Under the proposed order, the discrimination is merely palliated, rather than eliminated. Appellants asserted, moreover, not only that such a discrimination among works performed for the same "use" was inequitable, but also that the specific standards incorporated in the proposed order assure that the greater performance credits for the same "use" would be awarded largely to the works of the largest publishers.

Because of the status as amici curiae to which appellants were limited by the District Court, they were unable to obtain and introduce proof in detail as to the full effect of the proposed order in this respect. The record shows, however, that as to one category of "use"—theme music³³—counsel retained by the Society's Di-

³⁸ A "theme" is defined as "a masical work used as an identifying signature of a radio or television personality or all or part of a radio or television program or series of programs" (R. 689). The types of "non-feature uses" (of which a "theme" is one)—"uses" other than for full or "feature" performances—for which a work that meets the tests of the proposed order may receive added performance credits are set forth in the "Weighting Rules". See R. 689-690.

The Society distributes a large portion of its revenues for "non-feature uses." During a nine-month period in 1957 for which figures are available, non-feature uses represented some 37 percent of the performances of the members' works reported in the Society's survey of performances (R. 267), and in that year over \$6,000,000 was distributed for performances by licensees of "themes" and one other category of non-feature use, "background music" (R. 137). The importance of non-feature uses is further illustrated by the fact that twelve works contained in a list supplied by the Society's Directors have earned more performance credits for performances as themes and background music than the entire catalogue of either Irving Berlin or Oscar Hammerstein (R. 137).

rectors pointed out that 360 out of 377 works in which the publisher members of the Board had an interest in 1958 and which were receiving added credits under the prior practice would continue to qualify for extra performance credits under the proposed order, and some of the remaining 17 might qualify (R. 212-213). Full disclosure of the facts would permit a similar analysis to be made of the potential discrimination in other "use" categories that will exist under the proposed order.

These inadequacies in the proposed order, taken together with appellants' status as members of the Society whom the Government had undertaken to protect, fully substantiate appellants' claim that they were inadequately represented by the Government in the proceeding below.

Moreover, contrary to what the District Court appeared to believe, the representation by the Government of the interests of appellants and other smaller members of the Society could not be found to be adequate on a mere showing that the proposed order constituted an "improvement"—however small—over the 1950 judgment. Several times in the course of the proceeding below the court suggested that it considered it important to know whether the provisions of the proposed order were even a slight "improvement" (R. 374, 379, 386, 404), and seemed to be of the view

³⁴ There was some uncertainty about 73 of the 360 works, but it appears clear that they would qualify as older works that had been first performed before January 1, 1943 (R. 212). In order to qualify for added performance credits, such older works need only accumulate 20,000 performance credits since that date, which counsel retained by the Society's Directors declared would be likely for any such work that could not otherwise qualify (R. 211).

that, if so, it was warranted in approving the proposed order. Such statements by the court suggest that it believed that the ASCAP general membership was required to be content with the Government's negotiation of a bare minimum of further protection from the dominating publishers in the Society.35 This view is opposed to the recent pronouncements of this Court in System Federation v. Wright, No. 48, October Term, 1960, decided January 16, 1961. The Court there indicated that in approving a consent decree that is entered in the enforcement of a federal statute, such as the antitrust laws, the court's "authority . . . comes only from the statute which the decree is intended to enforce", and that "the adopting court is free to reject agreed-upon terms, as not in furtherance of statutory objectives . . . " (slip opinion, p. 9). The standard, therefore, by which the court below should have measured the Government's representation of appellants' interest was not whether the proposed order was an "improvement" over the 1950 judgment but whether it brought the competitive relations of the ASCAP members among

the court's position in the proceeding below was not in keeping with its prior remarks expressed at a conference on June 19, 1959, at which it considered with Department of Justice attorneys and counsel retained by the Directors the procedure to be followed with respect to a hearing on the proposed order. In commenting upon the summary procedure that had been proposed by the Department and the Directors (R. 51-52), the court stated (R. 59-60):

[&]quot;But there is something basically different between us, and that is our philosophical approach to the responsibilities and obligations of the Court with reference to these final consent decrees in antitrust litigation.

[&]quot;I feel that the Court has a duty, independent of that of the Antitrust Division, a duty to see that the purpose of the statute is carried out in the proposed decree."

themselves into harmony with Section 1 of the Sherman Act, the statute under which the Government had sought relief on behalf of the general membership against the domination of the Society's affairs by its largest members.

3. APPELLANT'S POSITION AS AMICI CURIAE IN THE DISTRICT COURT

No doubt it will be urged by appellees that appellants' interests were adequately served by the permission accorded them to address the court below as amici curiae. Quite the contrary is true.

Appellants, in supporting their motion to intervene, did not merely criticize the provisions of the proposed order. They undertook to point out specific modifications that they were prepared to prove were necessary adequately to protect the competitive position of the smaller members of ASCAP from the dominating publishers. Appellants proposed, for example, alternative methods for distributing voting power within the Society, some of which are suggested in federal and state statutes for other forms of unincorporated associations (R. 376-377; DR. 1105-1107). See ASCAP Hearings, pp. 232-233. Appellants also urged that equal representation of the three major publisher groups-small, medium and large publishers-on the Board of Directors, or four representatives of each group on the twelve-man Board, would effectively insure "a democratic administration" of the Society's affairs (R. 372).38 Again, appellants were prepared

³⁶ The District Court expressly rejected a weighted voting system for its own referendum on the proposed order (see pp. 57-58, infra), yet it refused to grant appellants a standing to demonstrate the necessity for an amendment to the 1950 decree which would abolish weighted voting for the election of the Board of Directors of the Society.

to prove the necessity, and the feasibility, of having the Society's survey of performances conducted by an independent survey organization, which would be completely insulated from any possibility of influence or control by any ASCAP members (R. 387-388).

As amici, however, appellants were unable to affect the procedure to be followed by the court and the parties below in ruling upon the proposed order. They were, accordingly, severely restricted both in their criticism of the proposed order and in the presentation of their own proposals. Appellants were not permitted by the District Court even to make offers to submit proof to demonstrate the inadequacy of the proposed order, and to substantiate their own proposals and the necessity that they be incorporated in any amendments to the 1950 judgment (R. 371). Appellants were allowed only to argue through counsel that the proposed order should be rejected as a whole.³⁷

³⁷ The District Court stated on several occasions that it was powerless to do more than either accept or reject the proposed order in toto, and that if it did the latter, the only course then open to the Government to secure relief was a full trial of the issues raised by the 1941 complaint (R. 371-373, 383, 388-389, 405). Moreover, the Court repeatedly stated that it could not receive testimony on any proposed amendment to the 1950 judgment and yet have the judgment remain a consent decree, and finally stated (R. 389): "I cannot take testimony on [an amendment to] a consent decree unless I have the consent of both parties to a litigation, and that I so hold." The Court refused to hear argument to the contrary (R. 405). Yet the 1950 decree itself, in Article XVII, expressly permits the Government "on reasonable notice" to apply to the District Court for modification of that decree "in any respect" (R. 47). It is impossible to know how much this error on the part of the District Court contributed to its decision to deny appellants' motion to intervene. See pp. 63-68, infra.

Finally, as amici, appellants will be barred from proceeding further in this Court or in the court below to protect their interest. Unless appellants become intervenors, they will be unable to seek review of the District Court's refusal to permit proof that would have shown the insufficiencies of the proposed order, and of the court's approval of the order as it was submitted by the Government and the Society's Directors. It is settled that an amicus curiae has no standing to appeal from a judgment. E.g., Denver v. Denver Tramway Corp., 23 F. 2d 287, 295 (8th Cir., 1927), certiorari denied, 278 U.S. 616; Winter Haven v. Gillespie, 84 F. 2d 285 (5th Cir. 1936), certiorari denied, 299 U.S. 606.

A final word is warranted on the membership vote directed by the District Court. As already noted (pp. 14-15), that vote disclosed that the proposed order is opposed by more than 40 percent of the Society's publisher members and more than 30 percent of the writer members who cast valid ballots. All of these presumably were ASCAP members who were not permitted to take part in or to influence the negotiations between the Department of Justice and the Directors on the terms of the proposed order.

The voting procedure directed by the District Court called for the members of the Society to vote for or against the proposed order in its entirety (R. 477). The ASCAP members were confronted, therefore, with a choice between the proposed order or a continuation of the patently anticompetitive and injurious practices of the Society under the 1950 judgment. Moreover, the members were required to vote without benefit of the proof that appellants sought to present

on the deficiencies of the proposed order and as to the reasonable alternatives, and without benefit of the further facts that they might have elicited by discovery procedure. That there was nonetheless a very large but voiceless minority within the Society who were opposed to the proposed order underscores appellants' contention that the Government inadequately represented the interest of appellants in securing a decree which would protect the general membership from the Society's dominating publisher-members.

B. APPELLANTS ARE OR MAY BE BOUND BY THE PROPOSED ORDER

The order of the District Court denying appellants' motion to intervene does not refer directly to the second requirement of Rule 24(a)(2)—that one who seeks to intervene must establish that he is or may be bound by a judgment in the action. The ruling of the court made in the course of the proceeding below stated that one basis for the denial of appellants' motion was that they "were not a named party to the suit, and the suit had proceeded to a consent judgment" (R. 381). The final order recites (R. 489) "that applicants have permitted this cause in which they are not named as parties to proceed to judgment." If these statements were intended to relate to the question whether appellants are or may be bound by the proposed order, neither of the two objections which appear to be included in this portion of the District Court's ruling can be sustained.

1. The statement that appellants were not named parties to the suit by the United States appears to reflect an argument advanced by appellees in the court below. They there urged that because the 1941 antitrust suit was brought against ASCAP as an entity, under the antitrust laws and Rule 17(b)

of the Rules of Civil Procedure, as appellants could not establish that any judgment in the suit would bind them as members of ASCAP.

Neither the premise nor the conclusion of the argument can be sustained. The complaint filed by the United States in 1941 instituted a representative action against the Society and its then officers as representatives of the membership. Paragraph 3 of the complaint alleged:

"That the members of the Society other than those members thereof specifically named herein constitute a group so numerous that it would be impractical to bring all of them on before the Court by name; therefore, the aforesaid defendants named and described herein are sued as representir all members of the Society" (R. 9). 39

And Paragraph 18 of the complaint alleged that the complaint was filed against the defendants, the Society, "its officers and directors, and the members thereof, because of their violations, jointly and severally" of the Sherman Act (italics added) (R. 18).

³⁸ Section 8 of the Sherman Act and Section 1, paragraph 3 of the Clayton Act provide that any association existing under or authorized by the laws of any state shall be considered a "person" wherever that word is used in the antitrust laws (15 U.S.C. Secs. 7, 12).

Rule 17(b) of the Federal Rules of Civil Procedure provides that an unincorporated association which has no capacity to be sued as a legal entity under state law may nevertheless be sued in its common name "for the purpose of enforcing ... against it a substantive right existing under the ..., laws of the United States."

³⁹ The "aforesaid defendants" were the then president, secretary and treasurer of the Society.

The allegations of the 1941 complaint thus indicate that the Government has viewed its antitrust suit as a representative action brought pursuant to Rule 23(a)(1) of the Federal Rules. This Court's opinion in Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, makes it clear that in such a suit any judgment entered for or against the representatives of a class—here the ASCAP membership—would be res judicata as to all the members of the class.

Moreover, the result would be no different even were the suit deemed brought pursuant to Rule 17(b). This rule merely establishes the capacity of an unincorporated association to sue or to be sued in the federal courts to enforce a substantive right existing under the laws of the United States. Rule 17(b) could only strengthen the conclusion that a judgment against an

⁴⁰ Somewhat earlier the Directors of the Society themselves invoked the class suit device in litigation involving the rights of ASCAP members. Gibbs v. Buck, 307 U.S. 66, 68, 73; Buck v. Gallagher, 307 U.S. 95, 97.

⁴¹ In the Ben-Hur case the Court held that members of a class of certificate holders of an unincorporated insurance association could not sue to prevent the association from undertaking, among other things, a reclassification of its membership when the issue had been litigated in a suit previously brought by other certificate holders on behalf of the class. The Court found that the certificate holders in the second suit had been represented in the first suit through other certificate holder plaintiffs, and that the decree in the prior suit adjudicating the authority of the association to reclassify the membership was binding upon the certificate holders bringing the second suit. See also Stella v, Kaiser, 218 F. 2d 64, 65 (2d Cir. 1955), certioruri denied, 350 U.S. 835. So here, for example, the specification of a system of voting in the proposed order will bar appellants or other ASCAP members from relitigating the issue of the kind of voting system that the antitrust laws require of the Society.

association in such a suit would be res judicata as to its membership, for the member's position under the rule is comparable to that of a shareholder whose corporation is sued as an "entity." Indeed, as the Court of Appeals for the Fourth Circuit made clear in Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 148 F. 2d 403 (4th Cir. 1945), representative actions under Rule 23(a) and "entity" suits under Rule 17(b) may be used interchangeably to enforce claims existing under the laws of the United States, since no issues of federal diversity jurisdiction are presented in such litigation. See also, Underwood v. Maloney, 256 F. 2d 334, 341 (3d Cir. 1958), certification denied, 357 U.S. 865; 3 Moore, Federal Practice, pp. 3435-3436 (2d ed. 1948).

The effect, therefore, of the Government's suit under either Rule 23(a)(1) or Rule 17(b) would be to bar all ASCAP members from challenging as illegal under the antitrust laws any practices that a judgment entered therein required the Society to follow. The proposed order directs the Society to take certain actions

⁴² The opinion in the Tunstall case stated (148 F. 2d at p. 405):

The manifest purpose of the provision of rule 17(b) relating to suits against partnerships and unincorporated associations is to add to, not to detract from, the existing facilities for obtaining jurisdiction over them. The language of rule 17(b) relating to suits against partnerships and unincorporated associations is permissive. So also is the language of rule 23(a). Together they provide alternative methods of bringing unincorporated associations into court."

Association of American R.R., 132 F. 2d 408 (2d Cir. 1942), which hold that a suit against an unincorporated association pursuant to Rule 17(b) is not a "class" action, are obviously irrelevant. Such decisions neither involve nor determine the res judicata effect on the members of an association of a decision in the suit involving the association.

with respect to the voting for Directors, the conduct of the survey of performances, and the distribution of license fees. If appellants were to challenge as illegal under the antitrust laws such actions taken by the Society pursuant to the decree, their suit would in effect seek to compel the Society to take action other than that prescribed by the proposed order, which binds them as well as all other members of ASCAP. Appellants believe that the principles set forth in Supreme Tribe of Ben-Hur v. Cauble, supra, would defeat any such attack.

2. The second part of the court's ruling—that a consent judgment had been entered in the action-needs no extended comment. The fact that a judgment has been entered in an action provides no ground for a refusal to permit intervention where further proceedings are necessary without which the interest of the party seeking to intervene could not otherwise be protected. Thus, intervention pursuant to Rule 24(a)(2) has been authorized in order to allow the intervening party to take an appeal when the party that had represented his interest before a judgment was entered unjustifiably refused to do so. E.g., Pellegrino v. Nesbit, 203 F. 2d 463, 465-466 (9th Cir. 1953); Wolpe v. Poretsky, 144 F. 2d 505 (D.C. Cir. 1944), certiorari denied, 323 U.S. 777. So here, although the Department of Justice undertook further proceedings to protect the interests of appellants and other ASCAP members, its efforts, appellants contend, were largely inadequate. If this was the case, the fact that a judgment had once been entered in the suit is of no relevance in determining whether appellant's requested intervention in the re-opened proceeding should be allowed.

III

A MODIFICATION OF THE 1950 CONSENT JUDGMENT MAY BE SOUGHT BY THE GOVERNMENT AND ENTERED BY THE DISTRICT COURT OVER THE OBJECTION OF THE SOCIETY OR THE APPELLANTS WERE THEY PERMITTED TO INTERVENE.

The Motion to Affirm submitted by the Government (pp. 10-11) apparently raises a question that was of concern to the District Court, although not directly involved in the court's denial of intervention. Government has taken the position that if appellants are permitted to intervene in the proceeding below, "their consent to change in the [1950] judgment would be necessary and, by withholding their consent, they could exercise power of veto over entry of any consent judgment modifying the 1950 judgment" (p. 11). The District Court apparently was of the same view, but it dealt with the issue in somewhat different terms. As we have already noted (p. 56 n.37, supra), the court repeatedly stated in the course of the proceeding below that it could not receive testimony on the proposed amendments to the 1950 judgment and yet have the decree remain a consent decree, and that the alternative to a consent modification of the 1950 judgment was no modification at all or a trial on the merits of the Government's 1941 complaint against the Society."

differs markedly from the view it expressed at the hearing on June 19, 1959, which was attended only by Department of Justice attorneys and counsel retained by the Directors (see p. 54 n. 35, supra). Questioned by a Department attorney as to whether the court would take testimony on the proposed order, the court responded that it had not yet decided "whether or not... there should be testimony taken to assure me, as the judge, that [the] public interest is being amply protected [by the proposed order]"

Although the position of the District Court on this question is not entirely clear and the views of the Government are not elaborated in its Motion to Affirm, it is evident that the attitude of the court below and of the Government toward appellants' requested intervention has been influenced by their understanding of the effect such intervention would have upon the future course of proceedings to modify the 1950 judgment. We believe it proper, therefore, pending elucidation of the Government's views, to state briefly our own understanding of whether a modification of the 1950 judgment could be sought by the Government and entered by the District Court despite objection by the Society or by appellants were they permitted to intervene.

1. The 1950 judgment itself plainly authorizes the Government to apply to the District Court for "modification in any respect." The Government expressly reserved this power in Article XVII of the judgment (R. 47). The article first sets forth the language typically found in antitrust decrees retaining jurisdiction in the court:

"Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Amended Final Judgment to make application to

⁽R. 56). The court thereafter stated: "Now I may have to take testimony in order to satisfy myself that this modification is of public interest. I may have to take testimony concerning the present condition of the industry . ." (R. 57-58). At a further hearing on June 29, 1959, the court reaffirmed that it was empowered to take testimony on the proposed order, and that since the order was "an amended [sic] to a final consent, decree, it would still be a consent decree" (R. 72). The court's ruling at the October 19 proceeding that no testimony could be taken and that the proposed order must be approved in toto or not at all can not be reconciled with these earlier views.

the Court for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this Judgment, for the modification thereof, for the enforcement of compliance therewith and for the punishment of violations thereof."

The article then states:

"It is expressly understood, in addition to the foregoing, that the plaintiff may, upon reasonable notice, at any time after five (5) years from the date of entry of this Amended Final Judgment apply to this Court for the vacation of said Judgment, or its modification in any respect, including the dissolution of ASCAP (and at any time within two (2) years from said date apply to this Court for the vacation or modification of Section V(C) hereof)..."

The only reasonable construction of the second paragraph of Article XVII is that a modification applied for by the Government under its terms could be entered over the objection of the Society if an adequate showing were made by the Government in an evidentiary hearing on the issues raised by the proposed modification. This is suggested by the language of the paragraph which specifically provides that the further modification sought by the Government could include "the dissolution of ASCAP". Such relief would surely not be consented to by the Society or any of its members, including the appellants here.

2. Even apart from the express, agreed-to reservation of power in the Government contained in Article

⁴⁵ The parenthetical clause relates to a portion of the 1950 judgment that affects only the relations between ASCAP and those whom it licenses to perform its members' works.

XVII, the Government would have the power to request, and the District Court to order, a modification of the 1950 judgment over the objection of any other parties. This Court has ruled that a contested modification of an antitrust consent decree may be ordered if there is "a hearing that included evidence and a judicial determination based on it." Hughes v. United States, 342 U.S. 353, 358.

The Hughes case was an appeal by a party to an antitrust consent decree objecting to a contested modification of the decree that had been ordered by the district court without hearing evidence or making findings of fact. Pursuant to a consent decree entered following the decision in United States v. Paramount Pictures. Inc., 334 U.S. 131, two companies had been formed from a division of the assets of one of the motion picture defendants, Radio-Keith-Orpheum Corporation. The consent decree directed Hughes, who had a large stock interest in both companies, either to dispose of his holdings in one or the other company, or to deposit his stock in both companies with a voting trustee until he had sold his stock in one company. Hughes elected to trustee his stock, and the district court approved the terms of the voting trust. Thereafter, the Government requested the district court to compel the trustee to sell the stock, which the court did in a summary proceeding. In reversing the order of the district court because there had been no "adequate hearing" as to whether the modification of the decree sought by the Government was justified, this Court declared that it did not doubt the district court's power to order sale of the stock after a proper hearing.

In Liquid Carbonic Corp. v. United States, 350 U.S. 869, reversing, 123 F. Supp. 653 and 121 F. Supp. 141

(E.D.N.Y. 1954), the Court again was presented with the question whether a substantial modification could be ordered in an antitrust consent decree without a hearing. On the authority of the *Hughes* case, the case was remanded to the district court "for a hearing on modification of the consent decree."

The Hughes and Liquid Carbonic decisions would appear to dispel doubts as to the propriety of a contested modification of the 1950 judgment if the necessity for the change sought by the Government is supported by appropriate evidence at a hearing before the District Court. The Department of Justice itself has so interpreted these cases.46 Indeed, the decisions appear to be merely applications to the antitrust field of the general principle recently reaffirmed by this Court that a court of equity has inherent power to modify its decrees—whether entered after litigation or, by consent—as warranted by circumstances. System Federation v. Wright, No. 48, October Term, 1960, decided January 16, 1961. See also United States v. Swift & Co., 286 U.S. 106; Chrysler Corp. v. United States, 316 U.S. 556.

There are, therefore, two independent sources of authority—Article XVII or the *Hughes-Liquid Carbonic* line of decisions—upon which a modification of the 1950 judgment could be sought by the Government and ordered by the District Court. Under either, the opposition of the Society, or of appellants were they

⁴⁶ Hearings Before the Antitrust Subcommittee (Subcommittee No. 5) of the House Committee on the Judiciary, 85th Cong., 2d Sess., ser. 9, part II-vol. III, pp. 3748-3749 (1958). See Subcommittee No. 5, House Committee on the Judiciary, Report on "Consent Decree Program of the Department of Justice", dated January 30, 1959, pursuant to H.R. Res. 27, 86th Cong., 1st Sess., pp. 5, 293.

permitted to intervene, would have the effect only of requiring proof to be adduced in support of such a proposed modification. If this is the case, the fears expressed by the Government, and by the District Court, as to the consequences of allowing intervention by appellants are unjustified and may properly be disregarded.

CONCLUSION

For the reasons set forth above, the order of the District Court denying appellants' motion to intervene pursuant to Rule 24(a)(2) should be reversed, and the case remanded to the District Court for further proceedings.

Respectfully submitted,

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February, 1961

FILE COPY

No. 56

Office Supreme Court, U.S.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

SAM FOX PUBLISHING COMPANY, INC., ET AL.,

Appellants,

United States and American Society of Composers, Authors and Publishers,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE
AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

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Supreme Court of the United States

October Term, 1960

No. 56

SAM FOX PUBLISHING COMPANY, INC., ET AL.,
Appellants,

United States and American Society of Composers, Authors and Publishers,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

This appeal should be dismissed for lack of jurisdiction. If not so dismissed, the order below should be affirmed.

Questions Presented

Appellee American Society of Composers, Authors and Publishers (hereafter "ASCAP" or "the Society") submits that the questions presented are not as stated by appellants but are the following:

(1) The preliminary question of jurisdiction is whether an order of a district court denying a motion to intervene as of right filed pursuant to Rule 24(a).(2) in connection with a motion in an antitrust suit by the United States, may be appealed to this Court as "the final judgment of the district court" under Section 2 of the Expediting Act (32 Stat. 823, 15 U.S.C. §29), when appellants did not appeal from the final judgment which had been entered before they filed their notice of appeal from the order denying intervention.

- (2) The substantive question is whether three of the 6,457 members of an unincorporated association may intervene as of right when the Government and the association, who are the sole parties to a consent judgment in an action by the United States under the Sherman Act, jointly present a consent further amended judgment and
 - (1) the judgment being amended and the proposed judgment both run only against the association as a juridical entity (R. 35-48, 667-680)*;
 - (2) the District Court had invited all members to present their views as *amici curiae* and appellants participated at length in this capacity (R. 75-76, 365-408, 481-484, 570-580);
 - (3) the amended judgment was expressly conditioned upon its being approved by a vote of the membership, and was so approved (R. 679-680);
 - (4) appellants do not claim that the provisions of the amended judgment injure them in any way (see pages 12, 15, 30, infra);

For the convenience of the Court, we adopt appellants' referencing. Thus, the printed record is referred to as "R. ..." The record in the District Court which was not printed is referred to as "DR. ..." The subcommittee hearings lodged by appellants with the Clerk—and which are not part of the record—are referred to as "ASCAP Hearings, p. ..." Pages in appellants' brief are referred to as "App. Br. .."

- (5) the effect of intervention would be to give appellants the right to veto the proposed consent amended judgment approved by a majority of the members (see Point III, infra); and
- (6) appellants conceded below that the Court, in its consideration of the proposed consent amended judgment, could not require the Government or ASCAP to consent to a different judgment which appellants might prefer (R. 371-372, 405).

Statement

The consent further amended judgment of January 7, 1960, was entered by Chief Judge Ryan in an antitrust suit begun in 1941. A summary of prior events and proceedings will help to put the latest judgment in its proper context.

Description of Appellee ASCAP

Before the organization of ASCAP in 1914, there were no effective means by which the writers and publishers of music could secure payment for the use of their copyrighted musical works in public performances for profit. The users of music were so numerous and widespread that no individual writer or publisher could take the measures necessary to discover them or employ counsel to secure redress for unauthorized use. Moreover, users who wished to pay could not find a practical means of obtaining licenses from the owners of the thousands of copyrighted works which each of them performed annually.

As a means of solving the problems of both the creators and users of music, ASCAP was organized as an unincorporated membership association representing both writers and publishers, who grant to ASCAP a non-exclusive right to license the public performance of copyrighted musical works that they have composed or published. The writers and publishers are treated as joint owners of the performing rights, and the Society's revenues are divided equally between these two groups. The writers and publishers have equal representation on the Board of Directors, each electing 12 members of the Board.

The users of music are unwilling and often unable to keep records of all the works performed by them, or to account separately for each use. Therefore, the most practical procedure is for ASCAP to grant each user a non-exclusive license to perform all of the compositions in its repertory, and Section VI of the 1950 amended consent judgment so provides (R. 41). However, where individual licensing is feasible, such licenses are negotiated directly between the individual writers and publishers and the user; the Society may not engage in individual licensing unless requested to do so by both the user and the member whose work is involved (R. 41).

Thousands of users of music, engaged in giving many millions of performances annually, pay flat amount royalties to ASCAP for the use of its entire repertory. These revenues must be distributed by ASCAP among more than 6,000 members on the basis of the relative value of each member's contribution to the repertory. The prior consent judgments in this case, and the further amended consent judgment of January 7, 1960, contain provisions concerning the apportionment of these revenues and related matters.

Government's Suit

In 1941, the Government brought an antitrust action directed to ASCAP's dealings with its licensees. This complaint is conceded to be irrelevant to this appeal (App. Br. 6), except for the one clause which alleged that ASCAP had a self-perpetuating board of directors with exclusive power to control the activities of the Society (R. 16). Paragraph 8 of the prayer for relief in 1941 asked that the directors be elected by a membership vote*, and paragraph 9 asked that ASCAP be required to distribute its receipts among the members on the basis of the number, nature, character and prestige of their respective works, their length of membership in ASCAP, and the popularity and vogue of their works, all to be determined in a fair and non-discriminatory manner (R. 26):

The 1941 consent judgment (R. 27-35), which was entered without trial, dealt primarily with relations between ASCAP and its licensees. In two subparagraphs, the judgment adopted the prayer for relief with respect to voting and distribution of royalties, including in the voting provision language permitting the Society to weight the number of votes of its members on the basis of their respective classifications within the Society (R. 32-33). Thus, the 1941 decree achieved all of the relief sought in the complaint on these two matters.

In 1950, the Government and ASCAP proposed and the District Court entered an amended final judgment, again upon consent and without trial (R. 35-48). Again, the judgment was concerned mainly with the relations be-

^{**} By 1941, ASCAP's membership had grown to 1,340 members (R. 9).

tween ASCAP and its licensees. However, there were additional provisions dealing with voting and distribution of royalties among the members (R. 44-46). Jurisdiction was retained to permit the parties, i.e., the United States and ASCAP, to seek construction or modification of the judgment. It was specifically provided that after five years the United States could apply for a modification of the judgment in any respect. Jurisdiction was not retained for the purpose of permitting any of the members to seek modification of the judgment (R. 47-48).

Thereafter, certain members of the Society expressed complaints to the Department of Justice with respect to the voting and distribution systems of ASCAP (R. 304). Appellants complained to the Small Business Subcommittee of the House of Representatives.

Such complaints were inevitable. At the time of the hearings below, ASCAP had 6,457 members with music catalogues of varying types, sizes and popularity. The majority of the writer members received less than \$510 per year in royalties* from ASCAP because their works were relatively infrequently performed (see Ex. H; R. 655, 556), while the songs of Irving Berlin, Cole Porter, Richard Rodgers, Oscar Hammerstein and other popular and prolific writers received a much larger share of the performances. The majority of the publisher members earned less than \$750 per year in ASCAP royalties (see Ex. H; R. 655, 556), while the catalogues of ten groups of publishers contained the songs which received about two-

^{*} Publishers with one vote received less than \$750, on the basis of one vote for each \$500 or major fraction thereof. Writers with 25 votes or less received less than \$510, on the basis of one vote for each \$20 or major fraction thereof (R. 501, pp. 2-3).

thirds of all performances of the Society's repertory (R. 321).

The Society's board of directors is composed of 24 members, twelve of whom are elected by the writer members (composers and authors) and twelve by the publisher members. Votes were allocated among the members in proportion to the value of the catalogues they contributed to the Society as determined by their share in the Society's royalties (R. 319).

There were those, however, including appellants, who have urged that voting be on a per capita basis (see App. Br. 55n.; DR. 1106, 1107, 1143, 1144; ASCAP Hearings* pp. 53, 346). It has even been suggested that a large part of ASCAP's revenues be distributed on a per capita basis (R. 475-6).**

The distribution of revenues takes into account not only the frequency of performance of the various musical compositions in the Society's repertory, but also the nature of the composition and type of use. In addition to the fa-

^{*} In their Jurisdictional Statement, appellants stated that "[n]o issues of fact are involved in this appeal" (p. 13). However, after this Court entered its order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits, appellants lodged with the Clerk copies of hearings before a Congressional subcommittee, a report of the subcommittee, and documents from the files of the subcommittee, none of which is part of the record (App. Br. 1-2, 45). The unsworn statements of appellants before the subcommittee, together with appellants' briefs in the District Court, constitute their principal citations of "facts" in this Court.

^{**} See also ASCAP Hearings, p. 390, where Mr. Lengsfelder (of appellant Pleasant Music) suggested that a part of ASCAP's distributable revenue be distributed solely on the basis of length of membership, irrespective of performances.

miliar songs and orchestral works, musical scores or fragments are written solely as background for essentially nonmusical entertainment such as motion pictures or television dramatic presentations. Music specially written for background use is not normally played elsewhere. On the other hand, familiar songs and orchestral works are sometimes also used as background music where, because of their familiarity, they can, for example, effectively contribute to the story line of a dramatic presentation.

ASCAP treats all feature uses of music* as having equal value (R. 690, 706). Its weighting formula recognizes, however, that in non-feature uses, well-known works have a greater value than those which have not won public recognition by prior repeated feature uses (R. 706-711). Appellants, on the other hand, would have ASCAP ascribe to a few bars of music newly put together as atmospheric background music the same value it ascribes to a familiar song used because the audience will associate its well-known words with the action being depicted. The use of "Give My Regards to Broadway" to set a street scene in Times Square, or the use of "White Christmas" or "Easter Parade" to identify the time of the year, illustrates the added value to the user of such familiar works.

A further complaint of appellants concerned the means by which ASCAP identifies the music performed by its licensees. ASCAP had agreed in the 1950 judgment that it would make objective surveys of performances (R. 44). Whether they actually met modern survey standards became a matter of dispute.

^{*} Uses other than as themes, jingles or background, cue or bridge music (R. 689-690).

Familiar with these and other complaints, the Department of Justice advised ASCAP that it would seek modification of the 1950 consent judgment unless agreement could be reached to make certain provisions of the judgment more specific (R. 304). The Society retained special counsel to conduct the discussions with the Department and to present the proposed amendments to the membership (see R. 583-584).* Lengthy investigation and discussion resulted in agreement on a consent further amended judgment containing detailed provisions governing ASCAP's distribution of votes and royalties among its members (R. 304-305).**

The Proceedings in the District Court

When the parties presented the proposed consent further amended judgment to the District Court, they requested that notice be given to each of the members of the Society so that all members could express their views to the Court (R. 51-52). The proposed judgment also provided that it would not become effective until the members voted, in accordance with the Society's Articles of Association, to approve those provisions which required membership approval (R. 679-680).

Pursuant to an order of Judge Ryan dated June 29, 1959, members were given notice of a hearing to be held

^{*}One of appellants' principal arguments in this Court, which it does not attempt to document, is that special counsel represented only the Board of Directors and not the Society or its membership at large (e.g., App. Br. 27, 30). Appellants' view was not shared by the Department of Justice, the District Court, or the membership of the Society (see R. 583,584, 586, 666).

^{**} Appellants express no complaint about the other provisions of the 1960 amended judgment, and they are therefore not discussed in this brief.

on October 19, 1959, and they were advised that they might appear at such hearing and "make application to be heard upon the ground that the proposed consent further amended final judgment will not accomplish the antitrust purpose of this suit" (R. 75-76). Copies of the 1950 judgment and the proposed further amended judgment were mailed to each of the members (R. 76-78; see R. 292). Thereafter, the Society sent to its members a memorandum of the Society's counsel summarizing the proposed judgment (R. 81-97; see R. 292), together with the press release of the Department of Justice (R. 98-100; see R. 292).

Membership meetings were then held in Los Angeles and New York to discuss the proposed judgment. At each meeting, counsel explained to the members present the provisions of the proposed amended judgment, and these explanations were mailed to each of the members for the benefit of those who did not attend the meetings (R. 149-187, 188-228; see R. 292).

One of the subjects of discussion with the Department of Justice was the Society's survey of performances. At the recommendation of special counsel, the Society retained Dr. Joel Dean of Columbia University to redesign the ASCAP survey of performances (R. 346-347). This design was reviewed by the Department of Justice, and, as modified by the Government's own experts at the Bureau of the Census, the major principles of the new survey were incorporated in the proposed amended judgment (R. 314, 668-670). A memorandum of Joel Dean Associates explaining the new survey was sent to all of the members before the hearing on October 19, 1959 (R. 230-243; see R. 292).

All of the foregoing documents were filed with the court, together with the correspondence with members, including appellants, requesting information about the proposed amended judgment (e.g., R. 262-291; see R. 292).

On October 19 and 20, 1959, the proposed amended judgment was presented and explained to the District Court, and, in response to his invitation to those members who questioned the proposed judgment (R. 75-76), Judge Ryan heard, as amici curiae, four members appearing prose and nine lawyers representing approximately 225 members of the Society (R. 292-301; 317-318; 351-453; 474-488; 562-583; 586-588).

Appellants had moved to intervene prior to the hearings on October 19 and 20, 1959 (R. 251). Instead, they were given full opportunity to participate and present their contentions as amici curiae (R. 365-408; 481-484; 570-580).

The provisions of the proposed judgment which appellants have discussed are:

Section II, which requires ASCAP to conduct a scientific survey of performances (R. 668-670).

Section IV, which provides for the number of votes each publisher member shall have (R. 674-676).

Paragraph (B) of the Weighting Rules attached to the judgment and referred to in Section III(F) (R. 674; 690-693).

The Survey

At the hearing on October 19 and 20, 1959, Mr. O'Donnell and Mr. Bennett of the Department of Justice presented the proposed amended judgment to the Court. Mr. O'Donnell pointed out that the 1950 judgment merely required that ASCAP conduct "objective" surveys and that the Government had been kept fully informed of the manner in which ASCAP was complying with the 1950 judgment (R. 307). He also pointed out that although the new survey design had been approved by the Government's own experts at the Bureau of the Census, the proposed judgment provided that the Court should appoint a competent outsider periodically to review the design and operation of the survey and to report thereon to the Court and the Department of Justice, and that the Government reserved the right to reopen the survey provision after 18 months' experience (R. 314, 669-670).

Appellants suggested that ASCAP be required to put the conduct of the survey in the hands of some outside agency (R. 254, 387). This suggestion did not receive favor with the Court, the Department of Justice or ASCAP (R. 454, 663-664). However, the judgment does not prevent ASCAP's using an outside agency to conduct the survey if the members prefer it (R. 668), and appellants conceded that, as to the new survey design, the Joel Dean survey "is all right, sure. That is an improvement" (R. 386).

Voting

Mr. O'Donnell discussed the difficulty the Department would have in seeking a litigated change in the ASCAP voting procedures (R. 318-323). The Department had been advised of the voting formula adopted by ASCAP after the entry of the 1950 judgment, and the Department's

acquiescence was evidence that the voting formula was consistent with the intent of the 1950 judgment.

Mr. O'Donnell pointed out; however, that ten groups of publishers had 63 per cent of the eligible publisher votes and that, if they acted in unison, they could elect all the publisher members of the Board of Directors. The proposed judgment provided for a very substantially revised allocation of votes. Instead of the previous arrangement whereby votes were allocated on the basis of the value of each member's catalogue, the new judgment provided that votes would be based on each member's performance credits, and that an increasing number of performance credits would be required for each additional vote (R. 674-675). Thus, Mr. O'Donnell pointed out, these ten publisher groups, with about two-thirds of the performances, would be reduced to 37 per cent of the publisher votes (R. 320-321), and the aggregate voting strength of the publisher members then represented on the Board of Directors would be reduced from 56 per cent to 30 per cent of the. eligible publisher votes (R. 320).

There was also a new provision allowing any group of writer or publisher members representing 1/12th of the total writer or publisher votes to elect a director by petition in advance of the general election (R. 320, 676). This would permit the election of individual directors by any substantial group in the Society, and, in fact, two publisher directors were elected by petition in the 1960 elections (App. Br. 48n.).

Addressing himself to the question why the Government did not demand one vote for each member, Mr. O'Donnell stated that the Government "gradually came to believe that it wouldn't be appropriate or fair to go any further" (R. 321). To his own question: "Shall we have ASCAP run by a numerical majority with only a tiny fraction of the performances, or shall we have it run by a numerical minority which has a vast majority of the performances?", Mr. O'Donnell stated that the Government thought the new judgment strikes a balance (R. 322) and "that a prayer for equalizing of votes would be equivalent of a prayer for dissolution" (R. 323) because the members whose music represents the greatest part of the value of the ASCAP catalogue would not stay in a society in which they had no voice (R. 322).

Mr. O'Donnell made a further and very relevant observation:

"If the new judgment goes into effect, all these charges about a board of directors which is bent on ruining small members are going to fade in importance. The new judgment circumscribes very sharply what the board of directors may do in the area of distribution, surveys and grievance procedures with the result that its power to do the kind of harm that offends the antitrust laws is going to be very much curtailed if not eliminated." (R. 323)*

^{*}Appellants, in their discussion of the voting provisions, completely ignore the fact that ASCAP is managed by a board of 24 directors, 12 of whom (including the President) are writers and are elected to the board by the writer members. No one has ever charged that any writer or group of writers can be elected except with broad support of the general writer membership. Voting power among the writer members was widely dispersed before the 1960 judgment and is even more widely dispersed now.

Appellants conceded that the new formula for weighting votes was at least some improvement over that previously in effect (R. 374, 379). Moreover, the amended judgment only permits and does not require the Society to weight the votes of its members (R. 674).

Weighting

The last provision which appellants discuss deals with the different weight given to well-known works and to those works which are not well known, when used as themes or background music. Such distinctions have been made, with the knowledge of the Department of Justice, at all times after the entry of the 1950 judgment. Mr. Bennett, speaking for the Department of Justice, described this as being in accordance with "the inherent value of the music itself." * (R. 332)

Appellants concede that the provisions of the amended judgment respecting weighting constitute an improvement (R. 397). Moreover, the amended judgment leaves the Society discretion to make changes in the weighting formula such as those appellants desire (R. 690-693).

^{*}The necessity of such a rule was clearly demonstrated to the Department of Justice by examples mentioned in appellants' brief (p. 5217.). In 1958, 12 compositions used as background music and theme songs together had more performance credits than the entire catalogues of Irving Berlin and Oscar Hammerstein. None of these songs had any popularity as measured by feature performances (R. 147). One of the objectives of the new weightings was to insure that full credit for background or theme use would be awarded only to works which historically had, and continued to have, substantial popularity as indicated by repeated feature performances (see R. 690-693).

The Membership Approval

At the conclusion of the hearings, the Court suggested that a vote be taken of the members to see whether they approved the new judgment (R. 471), and this proposal was endorsed by counsel for the appellants (R. 476). The Court then directed that the vote be tabulated on a per capita basis as well as on the basis of the weighted vote which each member had under the Society's Articles of Association (R. 484). Provision was made for the Society to pay up to \$1,000 for printing and mailing literature of appellants and others soliciting the members to vote "no" (R. 481-482). The hearing was then adjourned to January 6, 1960.

Appellants and others solicited the membership to vote against the proposed judgment (Exs. C-1 through F of Ex. D; R. 608-619, 551) for a variety of different and conflicting reasons (e.g., Exs. A-1, D-1 of Ex. D; R. 607, 612, 551). The Board of Directors recommended an affirmative vote (Ex. L of Ex. D; R. 649, 551). Membership meetings were held in Los Angeles and New York, and all members were given a full opportunity to express their views (R. 493-496; see R. 292). Explanations of the proposed judgment were again mailed to all of the members (Ex. K of Ex. D; R. 631-648, 551).

Judge Ryan entered an order designating an independent firm of accountants to supervise the balloting, with special provision for secrecy of the ballot (R. 503-508). He also directed that the ballots be tabulated in several classes according to the members' participations in the Society (R. 507-508). The ballots were opened and tabulated in the courtroom in the view of the Court and the attorneys for appellants and other members (R. 536-560).

Weighting the votes as provided in the Society's Articles of Association, the proposed judgment was approved by 81.75 per cent of the writer votes eligible to be cast and by 84.30 per cent of the publisher votes eligible to be cast (Ex. H; R. 655, 556).

On a per capita basis, 3,629 members cast their votes in favor of the proposed judgment and 1,725 members voted against.*

Of the eight classes of writer members and the six classes of publisher members, graduated according to size, a majority of the members voting in each class voted to approve the judgment (Ex. H; R. 655, 556).

At the request of the Government, with the consent of ASCAP, and with the approval of the membership, the Court entered the consent further amended final judgment on January 7, 1960, stating in his opinion:

"The proposed judgment has been consented to by the attorneys for ASCAP with the unanimous approval of the Board of Directors as in their judgment accomplishing the best possible results for the Society as a whole and for its individual members. It is also the belief of the Antitrust Division that the decree is the best that today can be devised and framed; it recommends approval by the Court without qualification.

^{*} Of the 6,457 members, 1,103 did not vote. Appellants use these uncast ballots to state that the judgment was approved by only 56% of all members and only 47.7% of all publisher members entitled to vote (App. Br. 15n.). It is equally true that less than 27% of all the members and less than 33% of the publisher members entitled to vote, voted against the judgment.

Moreover many who voted against the judgment wanted no change at all in the existing system (e.g., Ex. A-1 of Ex. A; R. 607, 551) rather than the changes appellants wanted and did not get.

After careful consideration by the Court of the arguments for and against the approval of this proposed consent judgment, the Court finds that although not a panacea for all the alleged ills besetting the Society, the decree does represent definite improvement over existing procedures and that it will serve to advance the antitrust purposes of the Government suit and of the prior decrees." (R. 666)

On the same day, the Court signed an order appointing a former New York Supreme Court justice and a former United States senator to examine periodically the design and conduct of the survey and to report to the parties and the Court (R. 661-662). (The senator could not accept his appointment because of illness.)

The Motion to Intervene

Appellants' pleading in intervention, filed in support of their motion to intervene, prayed that the judgment be rejected by the Court and that any modified decree approved by the Court include different provisions (R. 258):

At the hearing, appellants did not claim that the provisions of the proposed amended judgment would injure them. Although attempting to minimize its advantages, appellants conceded that the changes made by the new judgment were for the better (R. 374, 379, 386, 397).

Appellants did not seek rejection as an end in itself. They suggested instead that, although there were no issues framed, the District Court should tell the Department to seek a different judgment more to appellants' liking (R. 372-373). Judge Ryan pointed out that he could not compel either party to consent to a judgment different from the

one presented on consent, and that he could not do so "indirectly, without hearing evidence" (R. 382).

Appellants agreed that the court's power in passing upon a proposed consent judgment is limited either to approval or disapproval of what is submitted (R. 372). Despite the Government's considered judgment that the proposed judgment was "the best that can today be devised and framed" (see R. 343, 666), appellants stated that they hoped that the Government would propose some different judgment over ASCAP's objection (R. 382-383). Judge Ryan pointed out that a contested application by the Department of Justice for further relief, in a case in which there had been no trial but merely a consent judgment, would require a full trial of the antitrust issues (R. 405).*

Appellants' motion to intervene was denied orally (R. 295-296, 381-382), and a formal order was entered on November 16, 1959. The grounds for denial were set forth in the order:

"Having found that representation of the public and the applicants by the Department of Justice was adequate and in the public interest; that applicants are members of and are represented by the Society with their consent; that applicants have permitted this cause in which they are not named as parties to proceed to judgment; and that it would not promote the interests of the administration of justice to permit the required intervention. . . ."
(R. 489-490)

^{*} It is clear that appellants wanted a judgment containing provisions not sought in the 1941 complaint and not covered by the prior consent judgments (see R. 256-258, 372).

After the vote to which appellants subscribed but which turned out to be adverse to them, appellants again urged the Court to reject the judgment in the hope that the Department of Justice and ASCAP would negotiate a consent decree more to appellants' liking (R. 571-572), and appellants renewed their motion to intervene, which was again denied (R. 576).

Appellants' suggestion drew the comment of Mr. O'Donnell that the vote of the membership "has completely exploded that myth that we heard so much of in October, that this proposed judgment did not represent the will of ASCAP but merely the will of the Board of Directors. I do not see how any responsible person can ever urge that again after the results [of the voting]" (R. 586).

Appellants did not file their notice of appeal from the November 16, 1959 order denying intervention until after the tabulation of the votes seven weeks later and after the amended judgment had been entered. Appellants took no appeal from the further amended final judgment, nor did they appeal from the denial of their renewed motion to intervene of January 7, 1960 (R. 714-717).

SUMMARY OF ARGUMENT

I.

An appeal does not lie solely from an interlocutory order denying intervention in an action under the antitrust laws brought by the United States. Section 2 of the Expediting Act, upon which appellants rely for jurisdiction, permits appeals only from "the final judgment of the district

court" in the action (32 Stat. 823, as amended, 15 U.S.C. § 29). United States v. California Cooperative Canneries, 279 U. S. 553; Allen Calculators, Inc. v. National Cash Register Co., 322 U. S. 137.

Cases arising under other statutes and governed by Section 1291 of 28 U.S.C., permitting appeals "from all final decisions" of district courts, furnish no precedent for appeals under the deliberately different language of statutes such as the Expediting Act, which permit appeals "only from those final judgments which terminate an action." Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541, 545.

Where the appeal from an interlocutory order is delayed until after entry of the final judgment, and no appeal is sought from the final judgment because its provisions do not injure appellants, the interlocutory order presents only a moot question. Cf. Sutphen Estates, Inc. v. United States, 342 U. S. 19. This is particularly true where, as here, appellants have deliberately permitted the time to appeal from the final judgment to expire on March 7, 1960 without appealing from it or filing any assignment of error with respect to that judgment.

II.

Intervention was properly denied pursuant to Rule 24(a) (2). Judge Ryan found that representation of the public and the appellants by the Department of Justice was adequate and in the public interest; that appellants are members of and were represented by the Society with their consent; that appellants permitted this cause in which they were not named as parties to proceed to judgment; and

that it would not promote the interests of the administration of justice to permit the requested intervention.

Appellants' motion to intervene did not comply with Rule 24(c) requiring that it be accompanied by a pleading setting forth the claim or defense for which intervention was sought. Appellants, members of the defendant Society, did not seek to assert any defense on behalf of the Society. Nor did appellants seek to assert any claim against their Society, admitting in the District Court that only the United States could assert a claim in an antitrust action brought by the United States (see R. 369, 372-373, 405; see also App. Br. 63, 65-67).

Appellants are not bound by the judgment in this action, which does not run against them and does not bar them from litigating any claims they may have in a subsequent proceeding. Sutphen Estates, Inc. v. United States, supra. Nor do appellants consider themselves bound; appellant Pleasant Music Publishing Corp. is a plaintiff in a pending action against ASCAP in a New York state court attacking, as it does here, ASCAP's voting system and its distribution of receipts among its members. Lengsfelder v. Cunningham, Index No. 13344-1957 (N: Y. Sup. Ct. N. Y. Cty.).

Ш.

If they were permitted to intervene as parties, the consent of these three appellants would be necessary before the Court could enter the amended judgment consented to by the plaintiff United States, and by the defendant ASCAP after approval by the vote of its membership. Appellants do not deny that, if permitted to intervene, they

would have ousted the District Court of power to approve the proposed consent judgment, irrespective of its merits, by merely withholding their own consent. The consent decree procedure, which the Congress has favored, could thus be nullified by any single member of any unincorporated association if he were permitted to intervene on the mere assertion that he is dissatisfied with being represented by the existing parties to the action. Appellants themselves admit that "none will ever expect that all of the members of the Society will agree" (R. 574).

I۷.

Appellants made no showing of facts to support their motion for intervention, which was unsupported by affidavits. Appellants' factual assertions in their brief in this Court are either without record citation whatsoever or are referenced to appellants' own statements submitted to a Congressional subcommittee and which they lodged with the Clerk of this Court, or to the statements in their own memoranda below, which are not proof of the assertions they may contain. Despite appellants' repeated statements that they offered in the District Court to prove their various assertions as facts, they made no offer of proof.

The District Court's findings on the motion to intervene cannot be reversed by appellants' citing their unproved assertions of facts not properly before either court. If appellants had any probative evidence to support their assertions, it could have been embodied in affidavits supporting their motion to intervene.

The ASCAP Board of Directors represented the societal interest of the entire membership of the Society.

Epithets such as "dominating members" cannot disguise the fact that the so-called top ten publishing groups were represented on the Board by only six* out of the 24 directors who unanimously approved the action taken, or the fact that the amended judgment was approved by a large majority of the members voting in a secret vote taken under the auspices of the District Court and endorsed by appellants.

Although appellants stated in their Jurisdictional Statement (p. 13) that this appeal involves no issues of fact, they have attempted to create such issues by repeated assertion (without evidence) of unlawful and improper conduct by "the dominating members" (e.g., App. Br. 38). Although these statements in appellants' brief are admittedly irrelevant to their appeal, it is necessary to correct at least enough of them to avoid the prejudice they might otherwise create.

ARGUMENT

I.

The order denying intervention is not appealable as "the final judgment" in the action.

Appellants' motion to intervene was denied by order dated November 16, 1959. Appellants waited until after the entry of the final judgment on January 7, 1960 and then filed a notice of appeal only from the order denying intervention and not from the final judgment itself. Appellants do not claim to have been aggrieved by the provisions of the amended final judgment and do not seek its reversal.

^{*} Compare list of publisher directors (R. 281) with list of top ten publisher groups (R. 274-276).

Under these circumstances, the appeal should be dismissed because, first, the order denying intervention is not separately appealable, and second, appellants present only a most question as the motion in connection with which they sought intervention has been finally determined and the time for appeal has been permitted to expire.

Appellants rely upon Section 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. §29, as authorizing their attempted appeal. This section provides:

"In every civil action brought in any district court of the United States under [the antitrust laws], wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

By permitting appeals in such cases only from "the final judgment" of the district court, "Congress limited the right of review to an appeal from the decree which disposed of all matters . . . and it precluded the possibility of an appeal . . . from an interlocutory decree," United States v. California Cooperative Canneries, 279 U. S. 553, 558. Accordingly, in Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541, 545-546, this Court distinguished between appeals from "all final decisions" of district courts authorized by 28 U.S.C. §1291, and cases where the Congress has allowed appeals "only from those final judgments which terminate an action." The Expediting Act is of the latter type. Therefore, the appeal should be dismissed, as the order appealed from concededly was not "the final judgment which terminate decision."

Appellants, however, assert that the Expediting Act permits their appeal from an order denying intervention apart

from an appeal from the final judgment of the district court. They argue that, both under the Expediting Act and the general appeals statute, the proper distinction is between denial of intervention as of right under Rule 24(a) and denial of permissive intervention under Rule 24(b), and assert that an appeal is permitted in the former case but not in the latter. (App. Br. 19)

This distinction avoids the issue. The question under the Expediting Act is whether an appeal from an order denying a motion to intervene under Rule 24(a) will lie separately and apart from an appeal from the final judgment.

Appellants would read their distinction into Allen Calculators, Inc. v. National Cash Register Co., 322 U. S. 137, asserting that "in affirming the denial of intervention as of right, this Court sustained its jurisdiction to entertain such an appeal" (App. Br. 20). This Court did not "affirm" the order denying intervention but dismissed the appeal. 322 U. S. at p. 143. Nor did the Court find that it had jurisdiction of the appeal apart from an appeal from the final judgment; the statement in the Court's opinion that it had entertained the appeal in Missouri-Kansas Pipe Line Co. v. United States, 312 U. S. 502, and distinguishing that case, cannot be read as a statement that the Court sustained its jurisdiction to entertain the appeal in Allen Calculators. 322 U. S. at p. 141.

The opinion in Allen Calculators fully supports the rule that no appeal lies under the Expediting Act except an appeal from the final decree on the merits:

"The record shows that the District Court had entered a final decree on the merits of National's petition prior to allowing the present appeal; and, if we treat the appeal as taken from that final decree, as we think is required by the Expediting Act, and as attacking that decree because the appellant had been wrongfully denied intervention, we should have to affirm the judgment since it is not shown that the District Court abused its discretion in denying intervention. (322 U. S. at pp. 142-143)

Appellants next cite Sutphen Estates, Inc. v. United States, 342 U. S. 19, for the proposition that an order denying intervention as of right is appealable. That proposition is not at issue here. The question here is whether such an order is separately appealable under the Expediting Act apart from the final judgment which terminates the action. In Sutphen, the appeal was from both the court's final judgment and the order denying intervention.

Appellants next discuss Missouri-Kansas Pipe Line Co. v. United States, 312 U. S. 502, which did not involve Rule 24 at all. 312 U. S. at p. 508. There, a judgment had previously been entered and jurisdiction reserved to permit Panhandle to "become a party hereto for the limited purpose of enforcing the rights conferred by Section IV hereof." 312 U. S. at p. 507n. As this Court pointed out, it was not "dealing with a conventional form of intervention" (312 U. S. at p. 506) and, "since the protection afforded Panhandle by Section IV of the decree could only be secured by the remedy designed by Section V, to wit, active participation in the suit, the denial of that protection is a definitive adjudication, and so appealable.

⁸ United States v. California Canneries, supra.

⁶ Id., cases cited p. 556.

[E]nforcement of this protection . . . is a vindication of the decree." 312 U. S. at p. 508.

That situation bears no resemblance to an application to intervene under Rule 24 in derogation rather than vindication of the prior judgment (see pages 40-1, infra), and where the applicant for intervention could, as in Sutphen Estates v. United States, supra, file a notice of appeal from both the order denying intervention and the final judgment itself.

California Cooperative Canneries, Allen Calculators, and the Pipe Line case are cited in Wolfson & Kurland, Jurisdiction of the Supreme Court of the United States (1951), for their statement, referring to the Expediting Act:

"But where the denial of a motion to intervene is urged as error in an appeal from the final decree the appeal will lie, but only to the Supreme Court, even though the intervenor is the sole appellant and the only error urged is the denial of the intervention." (at pp. 306-307)

This is precisely the point here: a separate appeal will not lie from an order denying intervention when no appeal is taken from the final decree.

'Appellants next seek to distinguish California Cooperative Canneries, supra, where this Court stated that an appeal would not lie except from a judgment "which disposed of all matters", by pointing out that the Court in that case (279 U. S. at p. 557) cited Collins v. Miller, 252 U. S. 364. Collins v. Miller was not an antitrust action and was cited because it announced the general proposition that

"A case may not be brought here by appeal or writ of error in fragments. To be appealable the judgment must be not only final, but complete. [cases cited] And the rule requires that the judgment to be appealable should be final not only as to all the parties, but as to the whole subject-matter and as to all of the causes of action involved." (252 U. S. at p. 370)

The opinion in California Cooperative Canneries does not embrace the statement in Collins v. Miller of the exception to this rule under other appeal statutes?

"The seeming exception to this rule by which an adjudication final in its nature of matters distinct from the general subject of the litigation, like a claim to property presented by intervening petition in a receivership proceeding, has been treated as final so as to authorize an appeal without awaiting the termination of the general litigation below [cases cited] has no application here." (252 U. S. at pp. 370-371)

Credits Commutation Co. v. United States, 177 U. S. 311, 316, also cited by appellants, is to the same effect.

However, the sole exception noted in Collins v. Miller, supra, even if applicable under the Expediting Act, has no more application here than in Collins v. Miller, particularly since appellants "await[ed] the termination of the general litigation below" before appealing.

Appellants also cite Brotherhood of Railroad Trainmen v. B. & O. R. Co., 331 U. S. 519. This was not an antitrust action and did not involve the Expediting Act. An absolute and unconditional right to intervene had been granted by Section 17(11) of the Interstate Commerce Act (54 Stat. 916, 49 U.S.C. §17(11)), and the case was decided in the context of entirely different statutes which did not limit

appeals to "the final judgment", but permitted appeals from "a final judgment or decree . . . in cases specified in section 44 of this title". Section 210 of the Judicial Code of 1911, 36 Stat. 1150, as amended, 28 U.S.C. §47a (1946).

Thus, none of the cases cited by appellants limits the the applicability to this case of the holding in California Cooperative Canneries, supra, that the Expediting Act, in order to expedite civil antitrust actions instituted by the United States, "limited the right of review to an appeal from the decree which disposed of all matters... and it precluded the possibility of an appeal... from an interlocutory decree." 279 U. S. at p. 558.

Nor do appellants offer any reason why their appeal solely from an order denying intervention should not be dismissed as most when they did not appeal from the final judgment which had already been entered before they filed their notice of appeal, and when appellants concede that the changes made by the amended final judgment, as compared to the prior judgment, were improvements.

Appellants suggest only that, if now permitted to intervene, the District Court might entertain a motion "made by appellants or perhaps the Government—to vacate the judgment of January 7, 1960, and to conduct further proceedings to modify the antitrust decree." (App. Br. 22) There would be no reason for the Government to make such a motion; it is already on record that the present judgment is "the best that can today be devised and framed" (R. 343, 666). Appellants do not claim that they—who were not parties to the 1950 judgment—have any standing to institute proceedings to modify the 1950 consent judgment.

II.

The District Court correctly denied appellants' motion to intervene.

Intervention is the procedural device

"whereby a stranger can present a claim or defense in a pending action or in a proceeding incidental thereto and become a party for the purpose of the claim or defense presented." 4 Moore, Federal Practice, par. 24.02, at p. 6 (2d Ed. 1950)

Appellants' motion to intervene as of right under Rule 24(a)(2) was properly denied because they failed to satisfy the requirements of that Rule that they show both (1) that representation of their, interest in the action by existing parties "is or may be inadequate" and (2) that they "[are] or may be bound by a judgment in the action."

*Moreover, appellants did not seek, as required by Rule 24(c), to intervene to assert any justiciable "claim or defense". They were not "defending" the defendant Society against a proposed consent judgment, which they conceded was an improvement over the existing judgment. They did not seek to present a claim against the Society, and do not contend that they could legally assert any such claim in an antitrust action brought by the United States.

In fact, under the specific terms of the 1950 judgment (R. 47), the Court could not allow appellants to intervene as parties because to do so would disregard the intentions of the parties when they consented to the prior judgment.

A. Representation of the public and the appellants by the Department of Justice was adequate and in the public interest.

The first of the District Court's findings on appellants' motion to intervene was that "representation of the public and the applicants by the Department of Justice was adequate and in the public interest." (R. 489) Appellants offered no proof to support their contention that the Department's representation was not adequate. Their quarrel with the Court's finding was best summarized in their memorandum to the District Court prior to the hearings:

"It goes almost without saying that the Department cannot be said adequately to represent the interests of applicants when it has already rejected their proposals and is advocating contrary positions of its own." (DR. 287)

We leave to appellee the United States the briefing of their representation of the interests of the members of the Society and the general public. We point out, however, that the District Court's finding was consistent with decisions denying earlier attempts at intervention in the instant case:

"The protection of the public interest rests upon those officials whose special responsibility and duty it is to enforce the laws. To permit intervention by private citizens, whose purpose in the main is self interest in proceedings instituted by the Government is more likely to hinder rather than help in the enforcement of laws." United States v. ASCAP, 11 F.R.D. 511, 513 (1951).

"Since the Government is the complainant in suit, the conduct and control of this litigation should be free from interference by private citizens. I am satisfied from a reading of the papers before me that the actions of the Department of Justice . . . indicate that it did adequately represent the interests of the petitioner." *United States* v. ASCAP, 23 Fed. Rules Serv. 24a.51, Case 1 (1956)

The Department of Justice was representing the interests of the general public and of the 6,457 members of ASCAP. It was the Department's responsibility to accommodate these varying interests to achieve the best result for all of them. We note that appellants are three out of the 1,365 publisher members of ASCAP.* No writer members have joined in the appeal.

B. The societal interests of the membership were properly represented by the Society.

Appellants' argument that they were inadequately represented by the Society is irrelevant in the context of the purpose for which they sought intervention, i.e., to promote their own individual interests by sponsoring action against the Society of which they are members.

The order denying intervention was entered during the recess of the hearings in the District Court taken in order to permit the vote of the membership.

^{*} Appellants repeatedly refer to themselves—even in their statement of the question presented (App. Br. 4)—as "smaller members." Appellants have lodged with the Clerk documents in which appellant Sam Fox Publishing Company, Inc. is depicted as one of the "larger publishers" in the Society:

[&]quot;Mr. Roosevelt. As one of the larger publishers, can you give any particular reason why you have never been elected to the board?

Mr. Fox. I believe that is probably due to the fact that there have been some differences of opinion, over the years, between my father, and more recently myself, and the present board of directors." (ASCAP Hearings, p. 335; see also R. 278)

In its order, the District Court found that appellants were represented by the Society with their consent (R. 489). Appellants do not quarrel with the finding but state that the conclusion that appellants could therefore not intervene on the ground that they were inadequately represented by the Society "is at odds with a long line of decisions." (App. Br. 32). Yet, appellants cite no decision "at odds" with that of the District Court. Cases cited from the field of corporate law present very different questions. There, intervention was sought by the stockholder to assert a claim or defense on behalf of his corporation on the ground that the claim or defense was not adequately being presented by the corporation.

Appellants here sought to assert no claim or defense on behalf of their Society. They were not seeking to avoid the imposition of a further judgment against the Society or to assert any defense which the Society failed to assert. They were certainly not seeking any relief on behalf of the Society, which was the defendant in the action.

Instead, appellants were seeking to intervene solely for the purpose of trying to persuade the plaintiff, the United States, to seek relief against the Society of which they were members (R. 372-373, 383). Thus, in effect, they were seeking to intervene as a party plaintiff in an action where their Society was a defendant. None of the cases cited in their brief bears any resemblance to this situation.

With respect to their societal interest in a judgment which would best serve the Society by a proper accommodation of the equities of all the members, appellants were adequately represented by the Society.

Before entering the amended judgment, Judge Ryan assured himself that the societal interest of the membership as a whole, including appellants, was adequately represented by the Society. The proposed judgment was submitted to a vote-with appellants' endorsement (R. 476)—and approved by a majority vote of the membership. Judge Ryan ordered that, in addition, the membership vote be tabulated according to size classes so that he could see how members of various classes voted (R. 507-508). A majority of the members voting in each of the eight classes of writer members and each of the six classes of publisher members approved the action taken by the Society in consenting to the judgment.*

C. Appellants are not "bound" by the further amended judgment.

Writer Members

4 to 5

6 to 10

over 20

11 to 20

Appellants agree that they had no right to intervene if they are not bound by the judgment of January 7, 1960.

Non participating 61% in favor of the Judgment Participating with 1 vote 58% 057% 2 to 5 votes 6 to 25 70% 26 to 50 75% 51 to 100 80% ** 101 to 250 80% over 250 88% Publisher Members With 1 56% vote With 2 to 3 votes 59%

**

16.4

46

64% .70% ".

67% 75% "

ie

^{*} The percentage distribution of votes cast in each of these classes was as follows (Ex. H, R. 655, 556):

Since appellants were not parties to that judgment, and the judgment does not direct them to do or to refrain from doing anything, clearly they are not bound by its terms.

Therefore, if appellants are "bound", it must be because the January 7, 1960 judgment is res judicata of the claim or defense they attempted to assert by intervention. Sutphen Estates, Inc. v. United States, 342 U. S. 19.* At the outset, however, appellants are faced with the difficulty that they asserted no justiciable claim or defense, and, in fact, nowhere in their brief do they specify the claim or defense they sought to assert.

Appellants sought to assert no defense to the entry of an amended judgment. Rather, they were urging that some additional or different injunctive provisions be included in the judgment against their Society. Appellants claim, in effect, that as members of the "group ... on whose behalf the Department of Justice purported to act" (App. Br. 17), they will be bound because the United States did not obtain precisely the relief appellants wanted. However, they do not claim to be "bound" as members of a "class" represented by the plaintiff, the United States.

Appellants' argument falls unless they can show that, when the United States seeks and obtains a judgment in an antitrust action brought by it under Section 4 of the Sherman Act (26 Stat. 209, 15 U.S.C. §4), others are

^{*} In Sutphen, this Court held that a lessor was not bound by an antitrust judgment which required the dissolution of the company guarantying the lease and substituted another guarantor, on the ground that the antitrust judgment would not be "res judicata of the rights sought to be protected through intervention." 342 U.S. at p. 21.

precluded by the application of res judicata from later asserting different claims in an action brought by them to enforce a private antitrust claim under Section 16 of the Clayton Act (38 Stat. 737, 15 U.S.C. §26).

Appellants' argumentation is quite different. They assert that this is a class action against an unincorporated association. They then seek to align themselves with the defendant ASCAP just long enough to claim that they are bound as members of the defendant class and to assert that a judgment in a class action is res judicata against all members of the class. They conclude that as members of the defendant Society against whom the judgment was entered, the judgment will be res judicata in a subsequent action in which appellants are plaintiffs against their Society.

This analysis must fail because, first, this is not a class judgment and, second, even if it were, appellants would not be bound by the judgment in a subsequent action in which they are suing their Society.

Appellants rely upon Supreme Tribe of Ben-Hur v. Cauble, 255 U. S. 356, for the proposition that "any judgment entered for or against the representatives of a class ... would be res judicata as to all members of the class" (App. Br. 60). In attempting to apply that proposition to this case, however, appellants refer only to the complaint and ignore the terms of the judgment.

Although the 1941 complaint had intimations that a class action may have been intended, the judgment itself ran not against the members as a class, but against the Society and those acting on its behalf (R. 28). The amended judgment of March 14, 1950, which entirely replaced the 1941

judgment, runs only against the Society (R. 35-48), except for the single provision, not relevant here, prohibiting officers and directors from participating in or voting on questions relating to transactions between ASCAP and licensees in which they have an interest (R. 44). The further amended judgment of January 7, 1960 runs solely against the Society and not against its members (R. 667-680).

These judgments make clear that this action was maintained as a suit against the Society itself as a juridical entity, as contemplated by Section 8 of the Sherman Act (28 Stat. 210, 15 U.S.C. §7) and Section 1 of the Clayton Act (38 Stat. 730, 15-U.S.C. §12); see also Rule 17(b) of the Federal Rules of Civil Procedure; Sperry Products, Inc. v. Association of American R.R., 132 F. 2d 408 (2d Cir. 1942).

Even assuming, arguendo, that this may loosely be described as a class action, appellants cite only Supreme Tribe of Ben-Hur v. Cauble, supra, for their assertion that they would be bound by the judgment. That case demonstrates another basic fault in appellants' argument. In Cauble, one group of members sued their unincorporated association to enjoin certain conduct, and lost. Another group of members brought a similar subsequent action and were held to be barred because their interests were the same as the plaintiffs' in the first action. Appellants suggest no factual parallel to our case.

In fact, appellants argue strenuously that their interests were not identical with those of the other members of the Society, and their entire brief is an attempt to divide the membership into antagonistic groups.

This points up the fatal inconsistency in appellants' argument. Appellants argue that they were not adequately represented by either the plaintiff or the defendant in this action, and also argue that they would be bound by the judgment because it is a class action. In Hansberry v. Lee. 311 U. S. 32, this inconsistency was held to be dispositive. That was a suit to enforce a restrictive covenant. A defense of invalidity of the covenant was met by a plea of res judicata. The Supreme Court of Illinois upheld the plea on the basis of a decree in an earlier class action holding the restrictive covenant to be valid. Relying on the due process requirements of the Constitution of the United States, this Court held that the prior decree could not be res judicata because the "selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." 311 U.S. at p. 45.

Appellant Pleasant Music Publishing Corp., has demonstrated its belief that it is not bound by the 1950 judgment against ASCAP. In an action entitled Lengsfelder v. Cunningham, Index No. 13344-1957 (N. Y. Sup. Ct. N. Y. Cty.), it asks the New York court for relief against ASCAP's weighted voting system as well as other relief in areas covered by the 1950 judgment. Consistently, ASCAP has not there asserted a defense of res judicata based on the 1950 decree in this case.

The argument that appellants are bound also ignores the fact, as stated by Chief Judge Ryan in his opinion, that the 1960 amended judgment "does not foreclose further steps to accomplish and achieve further improve-

ments when they appear to be either necessary or desirable" (R. 469). This judgment is still subject to the jurisdiction of the court to interpret or modify at the behest of the Department of Justice or the Society.

Moreover, in the area of the Society's survey of performances, the judgment does not preclude the Society from doing precisely what appellants desire, i.e., having the survey conducted by an outside agency (see R. 668).

The judgment does not prevent the Society from doing precisely what the appellants desire with respect to the weighting formula, i.e., ASCAP is permitted, but not required, to make distinctions in the credit awarded to various works for similar non-feature uses (R. 690).

The judgment does not prevent the Society from allocating votes on a *per capita* basis (R. 674) as suggested by appellants (see App. Br. 55n.).

All that appellants can even claim to be *res judicata* is that the membership of the Society has not been precluded from choosing between what the majority of the members now want and what the appellants have been seeking.*

D. Appellants have permitted this cause in which they are not named as parties to proceed to judgment.

Judge Ryan found that one of the factors barring the application for intervention was the entry of the prior decree (R. 489), which was entered at a time when appellants were all members of the Society (App. Br. 5n.).

^{*} If the 1960 judgment is res judicata and were vacated, appellants would find themselves with the 1950 judgment which they like even less and which, if appellants are consistent, would then be res judicata.

The 1950 decree (which entirely replaced the 1941 decree (R. 36)) provided for the retention of jurisdiction for the purpose of enabling the parties to apply for further orders and directions (R. 47). A further specific provision provided that, after five years, the plaintiff might apply for modification of the judgment in any respect (R. 47-48). Appellants do not contend that they were parties to the 1950 judgment, which was entered without objection by them although they were members at the time. Under those circumstances, to allow appellants to intervene to urge a modification of the 1950 consent judgment would contravene the provisions of that judgment.

"[I]ntervention will not be allowed for the purpose of impeaching a decree already made." United States v. California Cooperative Canneries, 279 U. S. at p. 556.

See also United States v. Radio Corporation of America. 186 F. Supp. 776 (E. D. Pa. 1960), appeal dismissed sub nom. Westinghouse Broadcasting Co. v. United States, 5 L. Ed. 2d 264, where an antitrust consent decree similarly reserved jurisdiction to permit the United States to apply to the court for further orders and the court held that it could not later allow a non-party to intervene.

E. It would not have promoted the interests of the administration of justice to have permitted the requested intervention.

The record adequately justifies the finding of the District Court that intervention would not have promoted the interests of justice. By 1956, the Department of Justice had begun its study which ultimately led to the 1960 amended judgment (R. 304). Judge Ryan's familiarity

with the situation dates back at least to his denial in 1956 of a prior motion by other members to intervene, in the course of which he stated that he was satisfied that the Department of Justice was adequately representing the interests of the members.*

The course of proceedings in connection with the proposed amended judgment furnished ample basis for Judge Ryan's finding that intervention would not promote the interests of justice. Moreover, Judge Ryan conducted the hearings in such fashion that the views of all of the members could be adequately expressed and their interests pro-Thus, appellants were given more than three. months' notice of the hearing and invited to participate as amici curiae (R. 75-76). The Judge read not only their memoranda but also the hearings before the Congressional subcommittee (R. 469). Because of appellants' assertion that the proposed judgment did not have the consent of the membership at large, Judge Ryan suggested, and appellants endorsed, a membership vote to determine this question. The judgment was not entered until after it had been approved, in a secret ballot under the supervision of the Court, by a large majority of the members voting.

Under these circumstances, to have permitted intervention would have taken from the 6,454 other members of the Society the right to approve the proposed consent judgment if the three appellants vetoed it (see Point III, infra).

^{*} United States v. ASCAP, 23 Fed. Rules Serv. 24a,51, Case 1 (1956), supra.

F. Intervention was properly denied.

If the appeal is not dismissed as unauthorized by the Expediting Act, the order of the District Court should be affirmed (i) because appellants satisfied neither of the two requirements of Rule 24(a)(2), i.e., a demonstration that representation by existing parties is inadequate, and a demonstration that appellants would be bound by the judgment, and (ii) because appellants were not attempting to assert a claim or defense as required by Rule 24(c).

III.

Appellants sought intervention as a means of ousting the District Court of jurisdiction to approve the proposed consent judgment.

A decision that appellants were entitled to intervention as of right would have had to be predicated on a finding that appellants would be bound by the judgment against the Society.* In that circumstance, no consent judgment could be entered except upon the consent of the intervenors, and, by withholding their consent, they could exercise a veto over the entry of the proposed consent judgment.

Intervention was not necessary to accomplish the purported purpose of intervention, i.e., to persuade the Government to seek relief more to appellants' liking. Therefore, the only real effect of the intervention sought would have been to permit appellants to veto the consent judgment and oust the District Court of jurisdiction to enter

^{*}As pointed out above, no such finding is permissible as the judgment runs only against ASCAP and has no res judicata effect on the appellants.

the proposed consent judgment despite the Court's approval of it and despite the consent of the United States and of the defendant with the approval of the majority of its membership.

If appellants, as three of the 6,457 members of the Society, could intervene and obtain a veto power, the same right would necessarily be available to any of the other members. In view of the large number of members of the Society and the differing size, nature and popularity of their catalogues, there could never be a plan that would satisfy everyone. For example, those members who contribute the most valuable musical compositions performed by the licensees of ASCAP might beto a judgment which did not permit them to obtain a share of the royalties commensurate with the value of their contribution. Others might veto any proposal which did not pay each member a share of the royalties, irrespective of his contribution to the overall ASCAP catalogue. For example, Mr. Lengsfelder (of appellant Pleasant Music) had suggested that a percentage of the Society's revenues be distributed solely on the basis of length of membership, whether or not the member had a single musical composition which any licensee had ever played (ASCAP Hearings, p. 390).*

It would be impossible to devise a judgment that would escape the veto of at least one of the members if mandatory

^{*} ASCAP is required to accept for membership any composer or author who has had one work regularly published and any publisher whose musical publications have been used or distributed on a commercial scale for at least one year and who assumes the normal financial risks of publication; one can thus become a member even though no musical composition written or published by him has ever been performed by one of the Society's licensees (R. 46).

intervention required no more than a claim that the member was dissatisfied with it. Appellants concede that "no one will ever expect that all of the members of the Society will agree" (R. 574).

Appellants would make it impossible to have consent judgments in actions brought by the United States under the antitrust laws against an unincorporated association. This position flies in the face of an express Congressional design favoring consent settlements of antitrust suits. Section 5 of the Clayton Act (69 Stat. 283, 15 U.S.C. §16) provides that consent judgments or decrees entered before any testimony has been taken shall be excepted from the provision that a final judgment or decree in an action brought by the United States under the antitrust laws shall be prima facie evidence in an action by any other party against the defendant under the antitrust laws.

Appellants content themselves with stating the obvious, i.e., that in a litigated proceeding by the United States under the antitrust laws, the judgment after trial does not depend upon the consent of either the defendant or of intervenors. This misses the point that the District Court was not hearing a contested proceeding brought by the United States to modify a prior judgment.* Appellants do not deny that, if permitted to intervene, they could and would have ousted the District Court of jurisdiction to approve the proposed consent amended judgment, by withholding their consent.

^{*} This distinction makes irrelevant here the decisions in Hughes v. United States, 342 U. S. 353, and Liquid Carbonic Corp. v. United States, 350 U. S. 869, cited by appellants, and, indeed, appellants' entire argument at pages 63-68 of their brief.

IV.

Appellants' brief asserts, as facts, statements made by them *dehors* the record, while at the same time conceding that they are irrelevant.

In their Jurisdictional Statement (p. 13), appellants stated that "no issues of fact are involved in this appeal, since no evidence was received or testimony taken by the Court below in connection with appellants' motion to intervene".

Appellants' notice of motion for intervention merely recited the statutory grounds for intervention set forth in Rule 24(a)(2) (R. 251). The motion was not supported by affidavits. Their pleading in intervention alleged that the proposed judgment should have some different provisions, but the pleading contained no relevant allegations of fact except an erroneous assertion as to the distribution of publisher votes* (R. 252-258).

Appellants elected to make their factual assertions in unsworn memoranda. Appellants now refer to these assertions as facts in the record and further assert, as facts, their own statements (many of them disproved at the time) which they had previously submitted to a Congressional subcommittee, including such items as a minority opinion by Mr. Fox (of appellant Sam Fox Publishing Company) when he was a member of the ASCAP Board of Appeals, abridged portions of correspondence and

^{*} These assertions purport to be based upon figures in the record (DR 1096n.) and are demonstrably incorrect (see pages 51-52, infra).

speeches, and unsworn statements of Mr. Lengsfelder (of appellant Pleasant Music).*

Rule 24 does not specifically require that an application for mandatory intervention be accompanied by affidavit or other proof to support the allegation that the applicant's interest is not adequately represented by existing parties. It would seem, however, to require at least a preliminary showing by affidavit if the application is based upon facts not otherwise before the Court.

Appellants offered no proof in support of their application to intervene. Appellants now seek a reversal of the findings and order of the District Court by relying on disputed factual assertions outside the record.

In an apparent attempt to excuse reference to these assertions of fact, appellants repeatedly state that they made offers of proof in the District Court. They made no offer of proof on their motion to intervene. They made no offer at the hearings to prove any of the specific assertions they make in this Court which are referenced only to their memoranda below or to documents lodged with the Clerk.

A general statement that, if permitted to intervene, appellants were prepared to prove the assertions contained in over 100 pages of memoranda (R. 371) was not an offer of proof of any specific facts and does not entitle appellants to recite these assertions as proved facts. Moreover, appellants' memoranda below ignored the accepted principle that memoranda should be based upon facts in the record which, in the case of motions, would include sup-

^{*} In the District Court, appellants referred to this material as "the statements and . . . the evidence, if we can call it that, adduced before the Congressional subcommittee" (R. 371).

porting affidavits. However, all of these assertions were brought to Judge Ryan's attention (see R. 63, 469), and appellants' arguments were fully heard by the Court.

Yet, although the record is clear, as Judge Ryan observed, that the Society did not admit that the purposes of the 1950 judgment were not being served (R. 663), appellee dares not leave unanswered appellants' erroneous assertions for fear that the Court might take failure to answer as an admission of their correctness.

The statement that twelve publishers were enabled to inflict unlawful competitive injury upon smaller members (App. Br. 7n.) is referenced by; (i) R. 256, appellants' pleading in intervention, which contains no such charge; (ii) R. 371, a statement of appellants' counsel which does not support the assertion in the brief; (iii) R. 381, another statement by appellants' counsel, which does not support the assertion; (iv) four pages of appellants' memorandum below, which do not charge unlawful competitive injury.

The statement that "publisher directors exercise a measure of control over the writer directors" (App. Br. 28n-29n.) is referenced to (i) testimony of Mr. Lengsfelder before a Congressional subcommittee which is more consistent with the conclusion that writers such as Oscal Hammerstein, Cole Porter, Richard Rodgers, the George Gershwin estate, and Lerner and Lowe, can exercise a strong influence over their publishers by threatening to turn over their new works to another publisher or, as Irving Berlin does, publish their works themselves; and (ii) testimony by Mr. Hammerstein before the Congressional subcommittee denying publisher control. Yet, this assertion is central to appellants' entire case because the ten largest

groups of publisher members are represented by only six out of ASCAP's 24 directors, a fact completely inconsistent with appellants' basic argument that these publishers dominate and control the Society to the injury of the "smaller members".

By mere assertion without record reference, appellants increase the number of "dominant" directors to eight by the statement that two other publishers "have traditionally allied themselves with the ten largest publishers" (App. Br. 45). But even eight is well short of a majority, and therefore appellants' argument hangs wholly on the unsupportable assertion that the publisher directors control the writer directors and that therefore these six or eight out of the 24 directors can run the Society solely for the benefit of the "dominating members". It is therefore not surprising that, at the end of the hearings in the District Court, Mr. O'Donnell described appellants' charge as a "myth" (R. 586).

Appellants assert that there are numerous illustrations of the directors' abuse of power (App. Br. 31). Appellants' "record" references are to prepared statements of Mr. Lengsfelder (of appellant Pleasant Music) submitted to a Congressional subcommittee, and testimony before the subcommittee of (i) Oscar Hammerstein at pages 148-149 of the hearings, which does not support the contention; (ii) of Mr. Peer at page 328 of the hearings, which is contradicted at pages 625-626 of the hearings; and (iii) of Mr. Fox (of appellant Sam Fox Publishing Company) at pages 341-346 of the hearings, which is contradicted at page 628 of the hearings.

When appearing before the District Court, counsel for appellants was more careful, discussing there "eliminat[ing] the potential of damage and of wrongdoing which the dominant group has had—I don't say proven against it, but which it has been alleged by the Department of Justice to have engaged in in the past . . . " (R. 388).

Even this much milder statement is not accurate or complete. There was no allegation by the Department of Justice of damage or injury to the "smaller members", and the District Court noted that there were no admissions of fact by the Society (R. 663, 667). There were disagreements which were resolved by the consent amended judgment, particularly the provisions whereby the votes of the larger members were substantially reduced and the voting power spread more generally among the members, and whereby many decisions which previously were within the discretion of the Board of Directors were removed from their discretion by more explicit provisions of the further amended judgment.

In discussing their objection to differing weights for works used as themes or background music, appellants suggest that the rule giving greater credit to well-known songs would favor the publisher members of the Board of Directors because 360 works in which these publishers had an interest, and which received full credit under the old formula when performed as themes, would continue to qualify under the new formula (App. Br. 53). Appellants omit a very significant fact: To qualify, a work must not only have been very popular at one time, but must also continue to be popular. Appellants refer to the fact that these 360 works meet the first test, but omit to state that they

will not qualify for full credit unless they also meet the second test of having received 2,500 feature performance credits during the latest five years, not counting more than 750 in any one year (R. 691). The Department of Justice, found that works qualify for full credit only on the basis of "the inherent value of the music itself" (R. 332).

We should also like to set straight the facts on the allocation of votes among the members of the Board of Directors and the ten largest publisher groups.

Under the prior system, when votes were based upon a member's contribution to the Society, the ten largest groups of publishers had 63 per cent of the votes eligible to be cast for the twelve publisher directors. Under the new judgment, the top ten publisher groups would have only 37.1 per cent of the publisher votes based upon 1958 performances, and the votes of publishers represented on the Board of Directors would be reduced from 56 per cent to 30 per cent. (R. 320-321)

On the writers' side, the votes were already widely distributed; it was necessary to add up the votes of approximately the top five per cent of the writer members, or about 250 members, to aggregate a majority of the vote for the twelve writer members of the Board of Directors (see R. 141). Under the new judgment, the votes of writer members were so widely distributed that no one was interested in the statistics.

Appellants argue that the top ten groups of publishers still control 50 per cent of the publisher votes (App. Br. 41-47). They start by ascribing 41 per cent to these pub-

lishers.* They then add 3 per cent for Schirmer and Fisher on the unsupported assertion that they "have traditionally allied themselves with the ten largest publishers" (App. Br. 45**). Appellants then assert that in the past only about 88 per cent of the votes have been actually cast, and conclude that the top ten publishers still retain 50 per cent of the vote.

Appellants then state that counsel for ASCAP refused to supply them with the per cent of the total publisher vote cast by the ten largest groups of publishers in the 1960 election for ASCAP directors and argue that no one could tell how or whether the Society was in compliance with the judgment because the ballots had been sealed and in-

^{*} Under the new voting formula, ten publisher groups would have initially had 37.1% of the publisher votes. This was the result and not the precise objective of the new voting formula. It was agreed that if this percentage increased by more than 10%, i.e., exceeded 40.8%, the voting formula would be adjusted to reduce the votes of the top groups. No limitation, however, was placed on the amount by which their share of the votes could decrease. (R. 675)

Appellants argue that the 10 top groups could increase their voting percentage to 40.8% by dividing their catalogues into a larger number of companies; on the sliding scale contained in the voting formula, two companies with 100,000 performance credits each would have more aggregate votes than one company with 200,000 performance credits. This "opportunity" is equally available to appellants, who are not restricted to a 10% increase in their votes.

^{**} The 3% figure is derived from a progression of combined votes of these two companies of 3.9% in 1954, 3.4% in 1955, 3% in 1956, 2.5% in 1957, and 2.2% in 1958, and ignores completely the fact that, based on 1958 figures and the new voting schedule, their combined voting percentage would be only 1.6%. This downward progression hardly proves an "alliance" with the top ten publisher groups to "dominate" the Society for their personal advantage.

formation as to the *casting* of votes was kept secret (App. o Br. 44n.).*

The only information necessary to ascertain compliance with the judgment is the percentage of the eligible vote which was possessed by the top ten publisher groups. This information is available to any member and has been supplied to the Department of Justice. The top ten publisher groups, in the latest election, had only 31.88 per cent of the eligible votes, and Schirmer and Fisher together had only 1.5 per cent.

At the hearing before Judge Ryan, appellants attempted to belittle the provision that one-twelfth of the publisher members could elect one of the twelve publisher directors by petition, and they asserted that this would never happen (R. 378). However, in the very first election, two directors were elected by the petition method (App. Br. 48n.). Appellants now argue that Mr. Morris represented one of the ten largest publisher groups (App. Br. 48n.), ignoring the fact that, despite being among the top ten, Mr. Morris had not previously been a director of ASCAP and did not become a director until the petition method was made available.** The top ten groups are not a monolithic front, but have the same "conflicting economic interests" as appellants ascribe to the next largest group (App. Br. 48n.), of which appellant Fox is a member (R. 278).

^{*} Compare appellants' concern at the hearing for the secrecy of the ballot (R. 378) and the Society's assurance that secrecy would be preserved (R. 466).

^{**} See R. 285-289, which shows the names of diffectors back through 1941.

Nor can the election by petition of Mr. Goodwin be brushed aside merely because he was being re-elected. To the extent that the top ten publisher groups used their votes to elect either Mr. Morris or Mr. Goodwin by petition, they decreased even further their percentage of votes in the general election which followed (R. 676).

These and similar statements in appellants' brief cannot obscure the fact that the amended judgment was approved by all of the Society's 24 directors and by the membership at large in a vote taken pursuant to the direction of the District Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal should be dismissed or, in the alternative, that the order of the District Court denying intervention should be affirmed.

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March 1961.

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No. 56

In the Supreme Court of the United States

Octonin Term, 1960

SAM FOX PUBLISHING COMPANY, INC., HT AL., APPELLANTS

UNITED STATES AND AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

ON APPEAL PROM THE UNITED STATES DISTRICT COURT FOR

BRIEF FOR THE UNITED STATES

ABORIBALD COX.

Solicitor General,
W. WALLACH SEREPATRICE,
Action Assisted Afterior General,
DARLES W. PEREDUAN,
Actions in the Address General,
EXCRASED A. SOLICION,
CEVELLA MERIEL,
JOHN L. SOLICIAN,

Department of Japtice, Washington S. D.O.

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In the Supreme Court of the United States

Остовек Текм, 1960

No., 56

SAM FOX PUBLISHING COMPANY, INC., ET AL., APPELLANTS

20

United States and American Society of Composers, Authors and Publishers

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court rendered no opinion in denying the appellants' motion for leave to intervene.

JURISDICTION

The order of the district court denying the appellants' motion to intervene was entered on November 16, 1959 (R. 489). The notice of appeal from that order was filed on January 14, 1960 (R. 714-717). On May 23, 1960, this Court postponed further consideration of its jurisdiction to hear this appeal to the hearing on the merits (R. 719). The jurisdiction

of this Court is invoked under Section 2 of the Expediting Act, 15 U.S.C. 29.

STATUTES AND RULES INVOLVED

The Clayton Act, 38 Stat. 730, as amended, 15 U.S.C. 12, et seq., provides in pertinent part as follows:

Sec. 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. [15 U.S.C. 15]

SEC. 5. (a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 4A [15 U.S.C. 16]

SEC. 16. Any person, firm, corporation, or association shall be entitled to sue for and have, injunctive relief, in any court of the United

States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven, and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: * * * [15 U.S.C. 26]

Section 2 of the Expediting Act, 15 U.S.C. 29, provides as follows:

In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court.

Rule 24 of the Federal Rules of Civil Procedure provides as follows:

. (a) Intervention of Right.

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by exist in parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the con-

trol or disposition of the court or an officer thereof.

, (b) Permissive Intervention.

Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure.

A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., § 2403.

- 1. Whether an order denying intervention as of right in a government antitrust suit is appealable under Section 2 of the Expediting Act.
- 2. Whether the appellants, three members of an unincorporated association which is the defendant in a government artitrust suit, were properly denied leave to intervene in rocceedings for the consent modification of an earlier consent judgment, where such intervention was sought as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure on the ground that the government, in negotiating the consent modification, inadequately represented the public interest.

STATEMENT

This is an appeal by three music publisher members of the American Society of Composers, Authors and Publishers ("ASCAP" or "Society") from an order of the district court for the Southern District of New York denying their motion to intervene in a proceeding in which a government antitrust consent decree was modified on consent. The antitrust decree was entered in a suit brought by the United States against ASCAP in 1941 charging it with violating § 1 of the Sherman Act (R. 8-26). The appel-

A fourth publisher, Movietone Music Corporation, which joined in the motion to intervene below and in the appeal to this Court, was dismissed as a party on stipulation (R. 719-720).

² The suit named as defendants ASCAP, its president, its secretary, and its treasurer (R. 8). The individual defendants were "sued as representing all members of the Society," since the latter "constitute a group so numerous that it would be impractical to bring all of them on before the Court by name" (R. 9).

lants have appealed only from the order denying leave to intervene and not from the final order approving the modification of the judgment.

Description of ASCAP.—ASCAP is an unincorporated association and its members are authors, composers and publishers of musical compositions. They assign to ASCAP a non-exclusive right to license the public performance of their copyrighted works, and it distributes among its members the fees or royalties collected for such licensing. As of the time of the hearing in the district court, ASCAP had approximately 6,400 members, of whom 1,100 were music publishers and 5,300 were authors and composers (collectively referred to as "writers") (R. 305).

ASCAP had been formed in 1914 by the leading composers, authors (of song lyrics) and music publishers of the day in a joint effort to insure that the three interrelated groups received payment when their copyrighted compositions were performed for profit. "ASCAP exists because no individual writer or publisher is large enough to be able to grant licenses to the thousands of commercial music users throughout the country and then enforce such licenses" (R. 139). At the same time, "ASCAP's members are competitors and the Society's manner of making distribution of its revenues to them vitally affects their ability to compete with each other" (R. 125).

Collecting the payments required the establishment of an organization equipped to search out the theatres, restaurants and other organizations regularly engaged in using music for profit, and requir-

ing them (and subsequently the motion picture and radio and television industries), on threat of infringement actions, to enter into royalty agreements. These agreements usually took the form of blanket licenses permitting the use, for a fixed fee, of all of the compositions in the ASCAP catalogue. These fees were in turn distributed equally between the publishers and the writers. The Society's operations, with respect to both its external relations with users of its members' music and the relation of the members among themselves, including the distribution of the money received from ASCAP's licensees among the individual writers and publishers, were conducted by a selfperpetuating Board of Directors which elected its own The Board consisted of twelve representatives of the publishers and twelve representatives of the writers (six of the latter represented the authors, and six the composers). The individual members had no vote in the election of the Board (R. 9). But the distribution of revenues to the ASCAP members was made by the Board on the basis of largely subjective determinations of the importance of the particular member and his works (R. 126).

The antitrust suit and the 1941 consent judgment.—By 1941, when the government's suit was filed, ASCAP controlled more than 75% of all copyrighted musical material used for public entertainment purposes, including the works of virtually all of the leading song writers. This power, the complaint alleged (R. 15-23), was being utilized to restrain trade in a number of respects, including refusals to deal with prospective licensees except on the basis

of a general license covering all ASCAP musical compositions, insistence upon contracts with radio stations providing for royalties determined in part upon a fixed percentage of the station's net advertising revenues, discrimination in the payments required of users similarly situated, and discrimination against the use of non-ASCAP music while at the same time arbitrarily restricting entry into the Society. The prayer for relief (R. 24-26) sought to prohibit ASCAP from engaging in these various restrictive practices in its dealings with its licensees. It also asked (R. 26) that ASCAP be prohibited (1) from electing its board of directors other than by a vote of all members for their respective representatives: (2) from distributing the royalties received to its members except in a "fair and non-discriminatory manner" based on the "number, nature, character and prestige" of the members' compositions, their length of time in the ASCAP catalogue, and the "popularity and vogue of such works"; and (3) from requiring, as a condition of writer membership, the "regular publication" of more than one composition by a person "who regularly practices [in] the profession".

The suit was terminated by a consent judgment entered on March 4, 1941 (R. 27-35). It regulated and restricted ASCAP's licensing activities, and also three aspects of its internal operations—distribution of receipts among members, voting for ASCAP's board of directors, and eligibility for membership. These latter three provisions (R. 32-33) were taken directly from the prayer for relief, supra. In addi-

tion, there was added to the section relating to voting the requirement that "[d]ue weight may be given to the classification of the member within the Society in determining the number of votes each member may cast * * *" (R. 32).

The 1950 judgment.—On March 14, 1950, an Amended Final Judgment, which "supersede[d]" the 1941 judgment (R. 48), was entered by consent of the parties and without adjudication of any issue of law or fact (R. 35-48). Like the previous judgment, most of the 1950 decree dealt with ASCAP's licensing activities.

Changes were also made in the provisions of the 1941 judgment that governed the rights of members upon withdrawal from ASCAP, the distribution of ASCAP revenues among the members, the voting rights of members, and eligibility for membership (Sections IV-G, XI, XIII, XV, R. 38, 44-46). The most significant changes made in these provisions were that (1) ASCAP was required to distribute its revenues to its members "on a basis which gives primary consideration to the performance of the compositions of the members as indicated by objective surveys of performances * * * periodically made by or for ASCAP" (R. 44); (2) the ASCAP board "as far as practicable [was to] give representation to writer members and publisher members with different participations in ASCAP's revenue distributions" (R. 45); and (3)

The provisions of the judgment applied to ASCAP, its officers, directors and agents, "and to all other persons, including members, acting or claiming to act under, through or for such defendant" (R. 37).

the general basis for classifying members for voting and distribution purposes was to be reduced to writing, with an appeal to an impartial arbiter or panel from any final ASCAP classification determination (ibid.).

The decree contained the usual reservation-of-jurisdiction clause, which permitted "any of the parties" to apply to the court for its construction, modification, or enforcement (R. 47). In addition, the United States was specifically authorized, at any time after five years from entry of the judgment, to apply for its "vacation * * or its modification in any respect, including the dissolution of ASCAP" (ibid.)

The 1960 amendments.—In 1956, as a result of complaints received from ASCAP members, the government instituted an investigation of ASCAP's operations under the 1950 judgment (R. 119). This investigation indicated "that in order to achieve the purpose of protecting the competitive opportunities of the members it would be necessary to spell out more specifically how the judgment should be carried out and in part to secure some supplementary relief implementing the 1950 judgment" (R. 304), and that "in at least six aspects the Judgment required more specific directives by the Court if the antitrust purpose of the government's suit were to be achieved" (R. 119). In 1958, the government began negotiations with ASCAP looking toward changes in the 1950 judgment. After 30 to 40 conferences (R. 305, 346, 584), the parties agreed upon various proposed amendments, which they then presented to the district court for approval (R. 62-63, 305),

In a supporting memorandum submitted to the district/court (R. 119-146), the government set forth the six respects in which it had determined that the 1950 judgment was deficient," and explained how the proposed amendment corrected the deficiencies "so as to carry out the antitrust purpose of this suit" (R. 119).

- 1. Although the 1950 decree gave ASCAP members the right to withdraw from the Society, this right was made "economically unfeasible" by regulations depriving withdrawing writers of 50 percent and withdrawing publishers of 45 percent of the credits due under existing licenses and of all revenues from future licenses. The 1960 amendment permits withdrawing members to leave works in the ASCAP catalogue and to be paid in full for their performance where ASCAP continues to license the composition (R. 120-121, 668).
- 2. Under the 1950 decree, ASCAP's survey of performances (which governed the distribution of revenues among the members), although based in part on a sampling technique, was neither scientific nor objective. The primary fault lay in the fact that undue weight was given to network performances which were completely and accurately canvassed; too little weight was given to performances on local radio and television stations, which were spot-checked in an inadequate and unscientific manner; and no weight at all was given to performances in such other media as bars, restaurants, night clubs and skating rinks, which accounted for more than 11 percent of ASCAP revenues. The result was that two-thirds of ASCAP's revenue distribution was based upon network performances

ASCAP, of course, did not concede those deficiencies (see R. 71, 663).

accounting for only one-fourth of its income, and that one-third of its revenue distribution was based upon local radio and television performances that contributed three-fifths of its domestic income (R. 121-122).

The 1960 amendments corrected the inequitable distribution of revenues by requiring that the survey of performances be based on scientific principles, developed by an independent consulting firm with the advice of the Bureau of the Census: Under these principles, network and local radio and television performances would each be given the same percentage weight in the survey as the income from the source; and the sampling techniques for securing information as to local station performances would be put on a scientific basis, with a larger sampling of the performances of individual-stations and the maximum use of station logs to supplement the tape recordings of the station's broadcasts. In addition, an experimental survey of performances in night clubs and dance halls and on wired music systems was to be instituted (R. 124).

It was specifically provided that the survey was to be subject to review upon motion of the government after an 18-month trial period, and that the court was to appoint a qualified person not connected with ASCAP periodically to examine and evaluate the working of the new system (R. 121–125, 668–670). (In accordance with the latter provision, the court appointed former Senator Ives and former New York State Supreme Court Justice McGeehan periodically to examine the design and conduct of the survey, to

^{*}The firm was Joel Dean Associates, headed by Professor Dean of the Columbia University Business School (R. 154, 194, 346).

"make estimates of the accuracy of the samples," and to report to the court and to the parties (R. 661-662)." But see fn. 21, p. 53, infra.)

3. Under the provisions of the 1950 decree requiring ASCAP to give "primary consideration to the performance of the compositions" of its members in distributing revenues (R. 44), a complex distribution system had grown up for "weighting" the raw performance statistics on the basis of such factors as what use was made of the music, the performance record of the member in preceding years, and his . length of time in ASCAP, in order to determine the revenue distribution to the individual ASCAP members. The government concluded that this system unduly discriminated against the newer and more active writers and publishers, in favor of members with longer tenure in the Society. Thus, the writers' distribution formula was based on a division of the proceeds to be distributed into four funds, only one of which (responsible for 20 percent of the total distribution) was based upon current performances; the remaining three funds were based on either performances over an extended period of time or on seniority as an ASCAP member. The publisher distribution

[&]quot;A Sustained Performance Fund (39 percent) was based upon the average number of performance credits of a writer for a five or ten year period, at his option. An Availability Fund (also 30 percent) had the same basic design as the Sustained Performance Fund, but additionally contained a series of "brakes" to prevent any early drop in classification regardless of the level of the member's continuing productivity. Finally, an Accumulated Earnings Fund (20 percent) was determined by multiplying the five-year average of these two previous funds by the length of time a writer has been a member of ASCAP:

was similar, although here current performance accounted for 55 percent of the distributed revenue (R. 125-131, 133-134). In addition, a procedure hadbeen established for weighting performance credits when compositions were used for non-feature purposes, such as advertising jingles or theme or background music, under which ASCAP classification committees could discriminate in the credits accorded performances of different tunes with similar uses, to a degree approaching in some instances a ratio of 1000-to-1 (R. 136-138). That is, 1000 times as much credit might be given for one tune used for background purposes as for another.' The "over-all effect" of this

Of the remaining 45 percent, 30 percent went into an Availability Fund, reflecting a five-year accumulation of performance credits on compositions first performed more than two years previously, and 15 percent into a Seniority Fund computed by multiplying a publisher's performance credits for a five-year period by the length of time it has been an ASCAP member.

The basic weighting problem arises from the fact that a high percentage of musical performances stems from the use of music, often on a continuing or repeated basis, for these subsidiary purposes. If these uses are given full value in computing performance credits, they will account for a percentage of the distributed ASCAP revenues far out of proportion to their actual worth in "selling" the ASCAP catalogue to prospective licensees. Thus, in 1958, twelve songs used as background and theme music on network programs earned more performance credits, on an unweighted basis, than the entire catalogue of Irving Berlin or Oscar Hammerstein (R. 137). On the other hand, performances of serious or lengthy musical works must be given extra credits if their composers or publishers are to receive any significant remuneration. A further problem, which directly involves the controversy in this case, relates to the type of composition used for non-feature purposes. It has been felt that the established works in the

distribution system was that more than 80 percent of all monies distributed to writers, and more than 45 percent of all monies distributed to publishers, were being "distributed on a basis which does not give primary consideration to performances as contemplated by Section XI of the 1950 Judgment" (R. 135).

Under the amended decree, a number of significant steps were taken to remedy this competitive imbalance. Most important, both writers and publishers were given an option to receive distribution of their money on the basis of current performance alone. For those not choosing this option, the multiple fund distribution systems existing under the 1950 decree were to continue in a modified form giving less emphasis to seniority or past performance and more to current performance. Moreover, the rules for

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ASCAP catalog should be given greater credit when utilized as theme or background material than other more ephemeral works which are not immediately recognizable by the average listener. But the extent of extra credit and the definition of an established work worthy of extra credit have involved considerable controversy.

Writers were permitted to use current performance up to a certain number of credits in any year; the remaining credits were to be compensated upon the multiple fund distribution system (R. 682). The maximum percentage of the publishers' income that they could obtain from current performance alone was to increase over a six-year period from 75 to 100 percent (R. 673).

^{&#}x27;In the case of the writers, the four funds were to continue but the Sustained Performance Fund (renamed the Average Performance Fund) no longer has the option of being calculated on a ten year instead of a five year period, and the "brakes" that limit the step-by-step rise and fall

weighting non-feature performances were set forth in detail, the degree to which different values could be given to different tunes used similarly was severely restricted, and the provisions for determining what songs could be given extra value were clearly enunciated. The change in the ASCAP revenue distribution system was subsequently described by the district court as "the most significant change in the consent judgment" (R. 664).

4. The government believed that, "One of the antitrust objects of this suit, as expressed in Section XIII of the 1950 Judgment [R. 45] is to 'insure a democratic administration of the affairs of ASCAP * *"" (R. 139). "Since ASCAP's members are in competition with each other, it was one of the antitrust purposes of this suit to make

¹⁰ Instead of weighting ratios of as much as 1000-to-1 for recognized compositions as against less favored tunes, a limit of 10-to-1 was imposed for most compositions, with a top limit of 100-to-1. This latter ratio applies in the case of certain background music which has not been commercially published or recorded for public sale and has not received five feature performance credits in the ASCAP survey of local radio performances over a five-year period (R. 691).

in classification have been severely limited. For the Availability Fund there was substituted a Recognized Works Fund, similar to the Average Fund but limited to works with a one-year history of performances (R. 680-682). In the case of publishers, the Current Performance Fund would increase from 55 percent to 70 percent while the Seniority Fund (changed in name to Membership Continuity Fund) is being gradually eliminated over a five-year period. The former Availability Fund is replaced by a Recognized Works Fund, in which songs at least one-year old would receive credit for the preceding year's performances, as contrasted with the previous system where credit was given for five years of performances of songs two years old (R. 684-686).

it impossible for certain members to use the Society to obtain an unfair advantage over their competitors" (R. 139-140). The ASCAP voting rules under the 1950 decree "frustrate[d] this express purpose" by weighting the votes of its members so that those who received the greatest share of its revenues also had the largest number of votes, and could thus select the directors who, in turn, determined the basis for distribution of the revenues (R. 140-141). ASCAP had given each writer member one vote for every \$20 of ASCAP income, and each publisher member one vote for every \$500 of ASCAP income (R. 141). Under this system, less than five percent of the writers, and less than one percent of the publishers, could together elect the entire Board of Directors (R. 141).

The 1960 amendments made numerous changes in the voting system. The principal ones were: (1) votes were to be weighted on the basis of current performance credits instead of income distribution; (2) the number of votes of any one member was limited and a graduated scale of performance credits for allocating votes was established, under which members with a large number of such credits would need more credits per vote than members with a smaller number of credits; (3) the top ten publishing firms and their affiliates were collectively limited to 40.7 percent of the total publisher votes; and (4) any person sponsored by writer or publisher members having one-twelfth of the writer or publisher votes automatically became a member of the Board. (R. 674-676). (At the last election, two members of the Board were selected by this method (App. Br., n. 30, p. 48).)

- 5. The 1950 judgment provided for appeal by any member from his classification (based, in part, on the number of performance credits awarded him, and on which his share of ASCAP revenues is determined) "to an impartial arbiter or panel" (R. 45; see R. 142). The government concluded that ASCAP's grievance machinery" did not accomplish the purpose of the 1950 judgment d insuring ASCAP/members equality of treatment and an adequate opportunity to protect their rights within ASCAP. The 1960 amendments established a better procedure to enable ASCAP members to secure information as to the basis of their classification; simplified ASCAP's internal appellate and grievance procedures; gave members the right to challenge before a special grievance board any alleged violation or misconstruction of the revenue distribution formula; and provided an appeal from the decision of such board to an impartial panel of the. American Arbitration Association (R. 676-678).
- 6. The 1950 judgment required ASCAP to admit to membership all writers or publishers who met certain requirements (R. 46). ASCAP, however, "at times refused to admit applicants despite the fact that they clearly were qualified for admission to membership under the provisions of Section XV of the 1950 Judgment" (R. 145). The 1960 amendments provided detailed provisions designed to insure that qualified applicants were not denied admission, and directed ASCAP to grant membership retroactively to any

qualified applicant previously denied admission (R. 146, 678-679).

The proceedings before, the district court.—On June 29, 1959, the government and ASCAP presented the proposed amendments to District Judge Ryan, who had been handling matters under the 1950 judgment (R. 62-74). The court set the matter for hearing on October 19, 1959, and issued an order to show cause returnable on that date (R. 75-76). The order provided that any person having an interest in the proceeding might then appear and make application to be heard in opposition to the proposed amendment; and it directed ASCAP to mail to each of its members a copy of the court's order, of the 1950 judgment, and of the proposed amendment (ibid.). The court stated (R. 65) that the "sole purpose" of the hearing was for "determining that the public interest will be best served by the modifications proposed and that it will * * * also serve to accomplish the ends sought to be accomplished by the original suit as it was filed.2' "

ASCAP mailed to its members the foregoing documents (R. 76-79) and an analysis by its counsel of the proposed judgment changes, which was filed with the court (R. 80-97). It also held membership meetings in Los Angeles and New York at which its counsel explained and discussed the proposed changes.

¹¹ Ten days previously, the parties had informally discussed with Judge Ryan the procedure to be followed (R. 49-61). At that time, the judge had stated that he had "a duty, independent of that of the Antitrust Division, a duty to see that the purpose of the statute is carried out in the proposed decree" (R. 60).

A copy of counsel's remarks at these meetings was mailed to the members and also filed with the court (R. 149-230, 351-352).

On October 13, 1959, the appellants moved to intervene in the proceedings, both as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure and on a permissible basis under Rule 24 (b) (2) (R. 251). The grounds of the motion were that the proposed decree was inadequate to achieve the purposes of the antitrust suit insofar as it dealt with the required new survey of performances and the weighting of ASCAP members' votes (R. 254-255, 256), and that the new weighting rules and formulae prescribed for determining the amount of credit to be given to a particular performance were unfair (R. 255). This motion was rejected by the district court at the outset of the hearing on October 19, 1959 (R. 295), and a formal order denying the motion "in all respects" was entered on November 16. 1959 (R. 489-490). This order stated as the reasons for the court's action (ibid.)

* * that representation of the public and the applicants by the Department of Justice was adequate and in the public interest; that applicants are members of and are represented by the Society with their consent; that applicants have permitted this cause in which they are not named as parties to proceed to judgment: and that it would not promote the interests of the administration of justice to permit the requested intervention * * *.

A renewed motion was rejected for similar reasons on January 7, 1960 (R. 576).

At the hearing on October 19 and 20, 1959, Judge Ryan not only heard counsel for the parties (the United States and ASCAP), but also heard as amici all of the eleven other persons who asked for a hearing (R. 351-452, 474-488), four of whom submitted memoranda (R. 294, 297, 299, 251). Counsel for the present appellants was heard at great length (R. 295-296, 365-408, 481-484) and submitted two extensive memoranda (R. 251, 370-371),12 In his written and oral presentation, counsel for the appellants argued in detail each of the propositions now relied upon to show the inadequacy of the decree and, thus, the alleged inadequacy of the government's representations of their interest in the effective enforcement of the antitrust laws and the protection of the weaker ASCAP members.12 Counsel for the appellants conceded that the proposed amendment, in the four respects which he criticized, constituted an improvement over the 1950 judgment (R. 374, 379, 386, 397, 403-404).

At the conclusion of the two-day hearing, the district court stated its view that "although this pro-

is These memoranda do not appear in the printed record, but are set out at pages 262-295 and 1077-1141 of the original record on file with this Court.

The appellants state (Br. 56) that the district court refused to let them make offers of proof. Since the judge did not allow the appellants to intervene and there was no taking of testimony, there was no formal offer of proof. The court had before it, both in considering the appellants' intervention motions and in deciding whether to approve the decree, the appellants' long memorandum (Original R. 1077-1141) which sets forth the basis upon which they challenged the proposed amendments.

posal which is now before me is not perfect, it is at least a substantial improvement upon present conditions, it does not foreclose further steps to accomplish and achieve further improvements when they appear to be either necessary or desirable. It permits of further study of the situation" (R. 469). With respect to the two aspects of the amendments that the appellants here principally challenge—the voting procedures and the performance survey-the court stated (R. 469) that the "important changes in voting procedures" that the amendments will require "without doubt * * * will improve the situation"; and that "the proposed survey and logging system is an improvement of what is presently in force and effect." It noted (ibid.) that the government "has reserved the right to ask the Court at a later date to require changes of improvements in the survey procedures," that "further improvements should be required if found desirable," and that "[w]e can only find out if they are desirable by testing out these surveys as now proposed and the logging systems as now proposed."

The court was unwilling to act upon the proposed amendments, however, until the ASCAP membership had first voted on it, since various members had indicated opposition (R. 468-469, 471, 478). The court indicated that the vote should be taken on a per capita basis as well as on the weighted basis provided in ASCAP's bylaws (i.e., weighted to reflect the members' varying contributions to ASCAP's revenues). The court directed that the balloting was to be conducted under the supervision of a member of the bar

appointed by the court and that all ballots were to be mailed by this appointee and to be opened and tabulated in open court. There was to be a separate tabulation of writer members and publisher members, and of subclassifications of each group according to the number of their votes; and these classifications and subclassifications were to be tabulated both on a per capita and on a weighted voting basis (R. 456, 478–479, 481, 484, 503–508, 590–602). The government, ASCAP, and the appellants approved the proposal of a vote by the membership (R. 476).

ASCAP agreed to, and did, pay \$1,000 of the expense of mailing to its members a circular prepared by those opposed to the proposed consent judgment, and also mailed all letters which individual members wished to have circulated with reference to the vote (R. 603-606). In addition, prior to the balloting, special membership meetings were held on the West Coast and in New York to give ASCAP members further opportunity to discuss the proposed consent judgment (R. 493-496).

The ballots were tabulated in open court on January 6, 1960, by independent auditors designated by the court. Approximately 83 percent of all members eligible to vote had cast ballots (5,354 out of 6,457). On a weighted basis, 83 percent of the votes eligible to be cast were cast in favor of the proposed consent judgment. On a per capita basis, 68 percent of all members who cast ballots voted in favor of it. Also, every one of the eight writer and six publisher subclassifications voted in favor, both on a per capita and on a weighted basis (R. 556-562, 655).

The following day, the court, after hearing those who asked to be heard in opposition to the decree (R. 562-577, 580-583, 588-589), including the appellants' counsel (R. 570-577), delivered an oral opinion which summarized the nature of the changes embodied in the proposed consent judgment and the reasons therefor (R. 662-667). The court, "[a]fter careful consideration * * * of the arguments for and against the approval of this proposed consent judgment," concluded that (R. 666)—

although not a panacea for all the alleged ills besetting the Society, the decree does represent definite improvement over existing procedures and that it will serve to advance the antitrust purposes of the Government suit and of the prior decrees.

The court accordingly approved the amended consent judgment (R. 667-680).14

The appellants' appeal, filed on January 14, 1960, is from the order denying their motion for leave to intervene entered on November 16, 1959 (R. 489, 714).

¹⁴ Two amendments to the 1960 judgment were made by an order entered by Judge Ryan on November 15, 1960, upon the consent of ASCAP and the government, and after notice and opportunity to be heard *amicus* given to the ASCAP members.

One amendment changed the definition of "recognized work" to permit songs that had appeared in the ASCAP survey for less than one year to share in the distribution of the Recognized Works funds (see fn. 9, p. 15-16, supra). The other amendment insures that newer writers will have the same "brakes" on any reduction of their revenues under the Recognized Works Fund as they would have on the basis of their recent performance record, had it not been for the "brakes" on any increase in this fund under the old arrangement that prevented them from obtaining such rights.

They did not appeal from the final order, approving the judgment, that was entered on January 7, 1960 (R. 714).

SUMMARY OF ABGUMENT

T

Section 2 of the Expediting Act, 15 U.S.C. 29, under which this appeal was taken, permits appeal from "the final judgment" of the district court in a civil action by the United States under the antitrust laws. our Motion to Dismiss or Affirm, we urged that the district court's order of November 16, 1959, denying the appellants' motion to intervene as of right, was not "the final judgment" of the district court and therefore was not appealable. Upon further consideration of the matter, we have concluded that the decisions of this Court indicate that district court orders denying intervention as of right in government antitrust cases are appealable if the applicant had the right to intervene; and that whether denial of intervention in a particular case is appealable depends upon whether the applicant had the right to intervene. We, therefore, do not now contend that this Court carnot consider whether the appellants' motion to intervene was improperly denied.

1. Although there is language in some of this Court's earlier opinions which can be read as indicating that under the Expediting Act an appeal may be taken only from the district court's final determination in the case, in Sutphen Estates, Inc. v. United States, 342 U.S. 19, 20, the Court flatly stated: "If appellant may intervene as of right, the order of the court

denying intervention is appealable." See, also, Brotherhood of Railroad Trainmen v. Baltimore & O. R. Co., 331 U.S. 519, 524, cited in the Sutphen case. In Sutphen, the Court explained that it had postponed the determination of the jurisdictional question to the hearing on the merits in order "to resolve [the] question" whether the applicant had the right to intervene. Upon concluding that it did not, the Court dismissed the appeal. See, also, Westinghouse Broadcasting Co. v. United States, 364 U.S. 518.

The rationale of these recent cases appears to be that if the applicant had the right to intervene, an order denying such right is appealable; and that the determination of the Court's jurisdiction to entertain the appeal thus turns on the merits of the claimed right to intervene. If there was a right to intervene, the order denying intervention is reversed; if there was no such right, the appeal is dismissed. Since, as we show below, the appealants here did not have the right to intervene, this appeal should be dismissed.

2. If this Court should hold that intervention was improperly denied, a further question arises as to the subsequent proceedings in the district court. Since the appellants have appealed only from the order denying intervention, only that order, and not the unappealed final order approving the amended consent judgment, is before the Court. Thus, if the Court were to reverse the order denying intervention, the appellants would become parties to the antitrust suit. As such, they would have the right under the decree (as modified) to apply to the district court for modifications thereof, including the amendments in

the 1960 decree. But in view of the appellants' failure to seek to appeal from the 1960 decree, and the fact that that decree has been put into operation and ASCAP has made many operating changes in accordance therewith, we do not believe that, if the order denying intervention should be reversed; the 1960 consent judgment should be automatically vacated.

TI

Rule 24(a)(2) of the Federal Rules of Civil Procedure provides for intervention as of right "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action "." The district court properly denied the appellants' motion to intervene as of right, since (1) the appellants' asserted interest in the proposed enforcement of the antitrust laws as related to the internal organization of ASCAP was adequately represented by the government and (2) the appellants are not bound by the judgment approving the modified consent decree with respect to the matters for which they sought intervention.

A. 1. A private party has no right to intervene under Rule 24(a) of the Federal Rules of Civil Procedure in an action brought by the government, on the grounds that the government is not properly conducting the litigation and that the would-be intervenor could more adequately protect the public interest. This is particularly true in the antitrust field where Congress has carefully provided separate paths by which the government and private parties, operating independ-

ently, may move to restrain violations of the law. United States v. Borden Co., 347 U.S. 514. Accordingly, private parties have been consistently refused permission to intervene in antitrust cases to vindicate either their private rights or the public interest.

These principles are particularly applicable to efforts to intervene in opposition to proposed consent settlements in antitrust actions. For the government may have good and proper reasons for agreeing to relief in antitrust cases narrower than that sought in the complaint or that other interested persons believe may best serve the public interest. But the policy judgments which necessarily enter into such determinations are neither capable of, nor appropriate for, judicial evaluation. Moreover, the mere admission of a private party may result in blocking any possibility of securing consent either because of the refusal of the intervenor to agree or because his participation may lead a defendant to withdraw its consent.

2. The record fully supports the district court finding that the government's representation of the public interest here was in fact adequate. The amendments to the decree made significant improvements in su important areas in which the 1950 judgment had been deficient. In arguing to the contrary the appellants all but ignore the modifications in the basic distribution formula to give younger and newer authors and publishers a fairer share of the ASCAP revenues; yet the amendment to this section of the decree was described by the district court as "the most significant change in the consent judgment" and "a substantial"

improvement over the present methods." Moreover, the appellants are not correct in contending that the amendments fail to make significant improvements over the situation prevailing under the 1950 decree in the two areas on which they do focus their attention. The provisions relating to voting for the Board of Directors cut the maximum voting strength of the allegedly controlling group of publishers from 2863 percent to 41 percent, and provisions were adopted guaranteeing any group of members with one-twelfth of the vote the right to name their own board member. Similarly, the modified performance survey makes substantial improvements over the existing system both in providing a more adequate and scientific sampling of actual performances and in insuring that information derived from different sources would be properly weighted to insure that the performance credits assigned to each member will reflect the percentage of ASCAP revenues derived from that source. In short, as the district court found (R. 666), the decree represents a "definite improvement over existing procedures" and "will serve to advance the antitrust purpose of the Government suit".

B. Appellants are seeking to intervene in order to impose additional restrictions upon ASCAP. But nothing in the consent judgment, as approved by the court, bars appellants from securing such further relief in any action it might bring against ASCAP. Sutphen Estates, Inc. v. United States, 342 U.S. 19. For the decree does not purport to set a maximum limit upon what ASCAP may do to correct any deficiency. in its internal operations, but merely provides certain

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minimum standards which it must meet. Since the 1960 decree is thus not res judicata of the rights appellants seek to protect through their intervention, they are not "bound" by the judgment within the meaning of Rule 24(a)(2). The 1960 decree does not bar the appellants from maintaining any action they may have under the antitrust laws against ASCAP; the appellants are no more bound here than the government would be bound by a decree obtained by the appellants in a private antitrust action. United States v. Borden Co., 347 U.S. 514.

ARGUMENT

1

THE JURISDICTION OF THIS COURT TO ENTERTAIN THE APPEAL

This appeal was taken pursuant to Section 2 of the Expediting Act, 15 U.S.C. 29, which provides for direct appeal to this Court from "the final judgment" of the district court in a civil action brought by the United States under the antitrust laws. In our Motion to Dismiss or Affirm we urged that the district court's order of Nevember 16, 1959, denying the appellants' motion to intervene as of right, was not "the final judgment" of the district court from which an appeal lies to this Court under Section 2 of the Expediting Act; and that "the final judgment" in this proceeding was the district court's order of January 7, 1960, approving the amended consent judgment, from which no appeal was taken. In its order of May 23, 1960, this Court postponed further consideration of the jurisdictional question to the hearing on the merits (R. 719).

Upon further consideration of the jurisdictional question, we have concluded that, while the matter is not free from doubt, the decisions of this Court indicate that district court orders denying intervention sought as of right in government antitrust cases are appealable if the applicant had the right to intervene; and that the determination of this Court's jurisdiction to entertain such appeals depends upon the merits of the particular case, i.e., whether the applicant had the right to intervene. Thus, while we believe, for the reasons set forth below, that the failure of the appellants to appeal from the final judgment approving the modified consent decree affects the relief to which they might be entitled if they prevail on the merits of their appeal, we do not contend that the Court lacks jurisdiction to consider whether their motion to intervene as of right was improperly denied.

1. There is language in United States v. California Co-operative Canneries, 279 U.S. 553, 558, and Allen Calculators Co. v. National Cash Register Co., 322 U.S. 137, 142-143, which can be read to indicate that the Expediting Act, with the objective of preventing the delays consequent upon piece-meal review of questions arising in government antitrust proceedings, precludes any review of district court actions in such proceedings except as part of a review of the final distriet court adjudication; and that on such review the decree can be attacked "because the appellant had been wrongfully denied intervention" (Allen Calculators, supra, 322 U.S. at 142). But in Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, this Court did consider, prior to the final district court 587026 -61 --- 4

adjudication on the merits, the denial of a claimed right to intervene in a government antitrust case, albeit in the special circumstances there prevailing the decree itself provided for such intervention by the company (Panhandle Qil Co.) in whose behalf the intervention was sought.

In Sutphen Estates, Inc. v. United States, 342 U.S. 19, 20, the latest opinion of the Court dealing with the appealability of an order denying intervention in a government antitrust suit, the Court, after pointing out that the appellant had sought intervention as of right, flatly stated:

If appellant may intervene as of right, the order of the court denying intervention is appealable.

As authority for this statement, the Court cited Brotherhood of Railroad Trainmen v. Baltimore & O. R. Co., 331 U.S. 519, and Section 2 of the Expediting Act. The Brotherhood case arose under the Urgent Deficiencies Act, 28 U.S.C. 47a (1946), which permitted appeal to this Court from a "final judgment or decree" of the district court in certain suits under the Interstate Commerce Act. In holding that the Brotherhood had been improperly denied intervention as of right, and that such denial of intervention was appealable, the Court stated (p. 524):

Ordinarily, in the absence of an abuse of discretion, no appeal lies from an order denying leave to intervene where intervention is a permissive matter within the discretion of the court. * * But where a statute or the practical necessities grant the applicant an absolute right to intervene, the order denying interven-

tion becomes appealable. * * * And since he cannot appeal from any subsequent order or judgment in the proceeding unless he does intervene, the order denying intervention has the degree of definiteness which supports an appeal therefrom. * * *

It is true that in the Sutphen case, supra, the appeal was in fact taken both from the order denying intervention and from the final judgment of the district court (Record on Appeal, No. 25, O.T., 1951, pp. 119–120, 122), and the jurisdictional issue was neither briefed nor argued. But the opinion's unequivocal statement, and its citation of both the Brotherhood case and the Expediting Act, suggest that the Court was indicating that any order improperly denying intervention as of right is appealable.

In the Sutphen case, as in the instant case, the Court had postponed the determination of the jurisdictional question to the hearing on the merits. The Court explained that it had done so "to resolve [the] question" whether the applicant had the right to intervene. After concluding that it did not, and also that there was no abuse of discretion in the denial of permissive intervention, the Court dismissed the appeal. See also Westinghouse Broadcasting Co. v. United States, 364 U.S. 518, where the Court per curiam recently dismissed an appeal from an order denying intervention (sought both as of right and on a discretionary basis) by a private party in a government antitrust suit that had been settled by a consent judgment.

The rationale of these recent cases thus appears to be that if the applicant "may intervene as of right, the order of the court denying intervention is appealable" (Sutphen case, supra); and thus that, in order to determine whether an appeal lies, the Court must. examine the merits of the claim for intervention. the applicant had the right to intervene, the order denying intervention is appealable and must be reversed (Brotherhood case, supra); if, on the other hand, there was no right to intervene, then the order denying intervention is not appealable, and the appeal is dismissed (Sutphen and Westinghouse cases, supra). In the instant case, accordingly, we agree that it is proper for the Court to consider whether the appellants had the right to intervene. Since as we show in Point II, infra, however, they did not have that right, we submit that the appeal should be dismissed.

2. If this Court should hold that intervention was improperly denied, a further question arises as to the subsequent proceedings in the district court. Since the appellants have appealed only from the order denying intervention, only that order, and not the unappealed final order approving the amended consent judgment, is before this Court.

The appellants, relying on the discussion of a similar question in the *Pipe Line* case, *supra*, suggest that if they were to prevail, the district court upon remand might, *sua sponte* or on motion of the government, set aside its order of approval and reconsider the merits of the proposed consent settlement with appellants as parties. But the situation in the *Pipe Line* case is inapposite. It is true, as this Court noted

(312 U.S. at 509), that in the Pipe Line case the district court had issued an "opinion", after the denial of intervention but before this Court's decision on the appeal from the intervention order, directing the parties to submit an order embodying the terms of the opinion. But no order had been submitted and no final judgment or decree had been entered. This Court's remand on the intervention point, accordingly, could be considered by the district court in the context of a still pending proceeding.

Here, on the other hand, a final judgment has been entered and the time for appeal therefrom has long since expired. The amended consent judgment has been put into operation, ASCAP has made many operating changes in accordance therewith, and distributions to members have been made on the basis of the new formulae.

If the appellants should prevail on their claim to intervene, this Court's reversal of the order denying intervention would result in their being made parties to the antitrust suit. As parties, they would have the right, under Section XVII of the 1950 decree, "to make application to the court for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this Judgment, for the modification thereof, for the enforcement of compliance therewith and for the punishment of violations thereof" (R_47). But in view of their failure to take any action to prevent the 1960 modifications from becoming effective, we do not believe they should or would be entitled to have these modifications set aside, except through the procedures

under Section XVII of the decree by which "parties" thereto may seek modifications. Whether ASCAP would be entitled to have the 1960 decree vacated because of the change in circumstances resulting from the appellants' intervention is a question for the district court.

П

THE DISTRICT COURT PROPERLY DENIED THE APPELLANTS'
MOTION TO INTERVENE AS OF RIGHT

Although the appellants sought intervention both as of right and on a discretionary basis, they have appealed only from the denial of intervention as of right. Rule 24(a)(2) of the Federal Rules of Civil Procedure provides for intervention as of right

when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action * * *.

Appellants conceded below (R. 251) that, in order to intervene under this provision, they must establish both that their interests may be inadequately represented by the existing parties and that they may be bound by the judgment. See Cameron v. Harvard College, 157 F. 2d 993, 996 (C.A. 1); 4 Moore's Federal Practice, 2d ed., § 24.08. As we shall show, the appellants satisfy neither requirement.

Preliminarily, however, we point out the unusual character of the intervention here sought. The appellants attempted to intervene to oppose the position taken by the parties to the antitrust suit (the government and ASCAP) that the proposed amendments were an appropriate step toward carrying out

the purpose of the suit by strengthening, in significant respects, the 1950 consent judgment. The appellants do not claim that the amendments, as far as they go, are improper; indeed, they concede that the changes are an improvement over the existing situation. Their sole objection is that the amendments do not go far enough, i.e., that further modifications of the 1950 judgment are required to accomplish the purposes of the suit. They are thus, in effect, seeking to intervene as parties plaintiff on the side of the government—plaintiffs seeking to further the same public interest that the government is protecting, but attempting to go beyond what the government deems appropriate to protect that interest.

The appellants make no claim that the extensive negotiations between the government and ASCAP leading to the amended judgment were not carried out fairly or that the government attempted in any way to favor particular segments of the ASCAP membership at the expense of other segments. They do not charge that the Attorney General and his e representatives have not conscientiously performed their duty to enforce the antitrust laws in the way that they believe will best serve the public interest, or that the government misstated the facts when it advised the district court that the proposed amendments made "very substantial strides diminishing concentration of control" by large members (R. 321), "circumscribe[d] very sharply what the board may do in the area of surveys, distributions and grievance procedures * * (R. 323), and represented the "outermost limits" to be obtained by negotiating (R. 321).

What the appellants, in essence, are seeking to dothrough their attempted intervention, therefore, is to substitute their judgment for that of the Attorney General and the district court as to what the public interest requires in correcting the deficiencies that have developed under the 1950 judgment. Both the government and ASCAP concluded that the amendments made substantial improvements in the competitive situation in the Society by strengthening the position of the newer and smaller members vis-à-vis the older and more powerful ones; every classification of the ASCAP membership voted in favor of the amendments (both on a per capita and on a weighted average basis); the district court, after hearing at length all the objectors to the amendments (including the appellants), concluded that the decree "does represent definite improvement over existing procedures and that it will serve to advance the antitrust purposes of the Government suit and of the prior decrees." (R. 666). The appellants would nevertheless reject the substantial improvement accomplished by the amendments and, in the hope of obtaining somewhat greater relief, throw the matter into what the government described as "very lengthy and very difficult litigation with very uncertain results" (R. 327).

As we shall now show, in these circumstances the appellants failed to establish their right to intervene as of right under Rule 24(a)(2).

A. The United States Represents the Public Interest in Government Antitrust Cases, and Private Parties Cannot Intervene in Such Cases on the Claim

That the Government is Inadequately Protecting the Public Interest.

The appellants state, as they did before the district court (R. 254, 256, 257), that in moving to intervene they were not "seeking to further any private litigation with the Society. Rather, they sought to assert adequately the very rights which the government was purportedly enforcing solely on behalf of the ASCAP general membership" (Br. 40). In other words, the appellants sought to intervene to vindicate the public interest in antitrust enforcement. But in so doing that totally misconceived the nature of the intervention as of right provided by Rule 24(a) of the Federal Rules.

We leave to the appellee ASCAP to discuss whether the appellants' interests were adequately represented by the Society. We note, however, that the district court found (R. 666) that

> [t]he proposed judgment has been consented to by the attorneys for ASCAP with the unanimous approval of the Board of Directors as in their judgment accomplishing the best possible results for the Society as a whole and for its individual members. * * *

and that all classes of the ASCAP membership, including necessarily those of which the three appellants are members, voted by a majority to accept the decree. But even assuming arguendo that ASCAP has not adequately represented the appellants' interests, the district court nevertheless correctly denied intervention as of right. For the United States, operating through the Antitrust Division of the Department of

Justice, both as a matter of law and as a matter of fact, adequately represented the appellants' interests. Since the appellants sought to intervene on the side of the United States, they had to show that the latter inadequately represented the public interest which they, too, are seeking to vindicate.

1. The basic weakness in the appellants' position is that a private party cannot intervene in a public suit instituted by the United States on the claim that, in conducting the litigation, the government is "inadequately" representing the interest of such person. For it is the government, and not private parties, that must determine how government litigation is to be conducted-even though the ultimate result of the litigation will be to benefit the private party or his The courts should not, and do not, attempt to evaluate whether the government is handling its cases properly, i.e., whether someone else might conduct the case differently or better, or seek different relief, or settle it on different terms. The government is always permitted to proceed on its own. This is particularly so where intervention is sought not to protect private rights, but to vindicate the public interest that the government is allegedly inadequately protecting in its conduct of the litigation. See infra, pp. 43-47. For whether the representation of a prospective intervenor's interest by the parties is "inadequate" within the meaning of Rule 24(a)(2) does not depend upon a subjective evaluation by the court of how well the litigation is being handled, but upon whether "there is proof of collusion between the representative and an opposing party, * * * the representative has or represents some interest adverse to that of the petitioner or fails because of nonfeasance in his duty of representation." 4 Moore's Federal Practice, 2d ed., § 24.08, pp. 38-39.

Nothing of this nature is charged here. It is not contended that there was anything collusive about the bargaining which took place between the representatives of the Antitrust Division and counsel for ASCAP which led to the proposed decree, nor is there any challenge to the government's statement that the proposed decree represented "the absolutely outermost limits to which ASCAP could be persuaded to retreat by negotiation" (R. 321). This case is unlike Kaufman v. Societe Internationale, 343 U.S. 156, relied upon by the appellants (Br. 35), where non-enemy minority stockholders sought to intervene as parties plaintiff in a suit against the government brought by their corporation, an alien enemy, to recover its property that had been vested under the Trading with the Enemy Act. Intervention was granted because the interest of the stockholders was in basic conflict with that of "the domipant enemy group which had charge of the suit [and who] would not press the corporate claim in a manner that would adequately protect the claims of innocent shareholders * * *." (343 U.S. at 158, see also id. at 160-161). Finally, there is here no suggestion of non-feasance, as in Wolpe v. Poretsky, 144 F. 2d 505 (C.A. D.C.), certiorari denied, 323 U.S. 777 (see App. Br. 36), where property owners, placed "on

an equal footing with the [District of Columbia] Corporation Counsel in the enforcement" of governing orders by the District of Columbia Code (144 F. 2d at 507), were permitted to intervene to appeal from an adverse court determination where the Zoning Commission "in executive session and without public hearing or notice to property owners affected" (id. at 506), decided not to appeal.15

¹⁵ The other authorities cited by appellants are similarly inapposite. United States v. Reading Co., 273 Fed. 848 (E.D. Pa.), modified and affirmed, sub nom. Continental Insurance Co. v. United States, 259 U.S. 156, and United States v. St. Louis Terminal R.R. Ass'n, 236 U.S. 194, 199, involved the right to participate as defendants in antitrust relief proceedings where the intervenor's interests were distinguishable from those of the original defendant. California Co-op. Canneries v. United States, 299 Fed. 908, 912-913, to the extent it involved intervention as of right rather than as a matter of discretion, rests on the court of appeals' conclusion that Rule 15. of the Supreme Court of the District of Columbia gave a right of intervention, "broader" than that provided by the federal equity rule then governing intervention, to "any one claiming an interest in the litigation" (299 Fed. at 912). See United States v. California Canneries, 279 U.S. 553, 556-557 (suggesting that the court of appeals' determination may have been in error). And in Textile Workers Union v. Allendale Co., 226 F. 2d 765 (C.A. D.C.), where a union and an employer in a high wage area were permitted to intervene asy defendants in support of an order of the Secretary of Labor under the Walsh-Healey 'Act, the court's holding was that appellants were "entitled to intervene under the terms of 24(b)" (permissive intervention) (226 F. 2d at 769, 770). While the court also found no barrier to intervention under Rule 24(a) in the fact that the Secretary was espousing the same position in the litigation, it did so not on the basis that his representation was inadequate, but rather that in the particular administrative law situation presented by that case "the precise bounds of) Rule 24's provisions do not necessarily bar intervention if there is a sound reason to allow it." (id.

2. What is true as to intervention in government litigation generally has particular relevance in the antitrust field, where the very nature of the problem demands that the "United States * * alone speak for the public interest * * *." Buckeye Coal & Ry. Co. v. Hocking Valley Ry. Co., 269 U.S. 42, 49. Congress has not been unmindful of the role that private persons, motivated by the protection of their own economic interests, can play in antitrust enforcement. To this end it has provided private antitrust actions for treble damages (Section 4 of the Clayton Act, 15 U.S.C. 15) and for injunctive relief (Section 16 of the Clayton Act, 15 U.S.C. 26), and has given private suitors the right to use a judgment in a government suit as prima facie evidence of the violations there adjudged (Section 5 of the Clayton Act, 15 U.S.C. 16). But the two types of proceeding-public and private-were purposely kept separate and distinct so that the public interest of the government would not be impeded by the special interests of the private litigant. As this Court stated in United States v. Borden Co., 347 U.S. 514, 518:

The private-injunction action, like the treble-damage action under § 4 of the Act, supplements government enforcement of the antitrust laws, but it is the Attorney General and the United States district attorneys who are pri-

at 768). The case in other words involved no more than an equitable application of a frequent statutory feature of judicial review of agency action under which interested parties are afforded a right to intervene in support of the validity of an agency order under attack (see e.g., 47 U.S.C. 402(e); 5 U.S.C. 1038). But we are aware of no statute providing a right to intervene in support of enforcement proceedings such as are here involved.

marily charged by Congress with the duty of protecting the public interest under these laws. The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served. * [T]he scheme of the statute is sharply to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other." United States v. Bendix Home Appliances, 10 F.R.D. 73, 77 (S.D. N.Y.) (1949).16

In accordance with these principles, the courts have consistently denied intervention in government antitrust cases. Thus, in *United States* v. *Bendix Home Appliances*, 10 F.R.D. 73 (S.D. N.Y.), the court denied discretionary intervention as parties plaintiff, sought to enable the intervenors to enforce a consent judgment entered in a government antitrust action.

¹⁶ In the early case of *United States* v. Northern Securities Co., 128 Fed. 808, 812 (C.C.S.D. Minn.), the court, in denying intervention as to the relief to be granted by the judgment in a government antitrust action, said:

It [the United States] is the conservator of the public welfare, and has a right to speak for the public. According to well-established rules, the petitioners cannot intrude into this litigation merely to protect the public interest or as amici curiae, so long as the government is present by its attorney general and expresses its disapproval of such intrusion. This would be wresting from the government that control over the litigation, so far as the public is concerned, which it has a right to exercise.

The court, per Judge Rifkind, said (10 F.R.D. at 76):

It would seem to be a necessary corollary of this dichotomy of rights which underlies the structure of the anti-trust laws that private persons may not intervene in suits which are maintainable only by the United States. And this corollary should apply whether the particular action is for enforcement of the anti-trust laws, or for the enforcement of decrees rendered under those laws.

The court further said (id. 77):

The very fact that the Congress has made an adjudication in a Government suit prima facie evidence of certain facts in a private suit would indicate that it was not the intention of the Congress that private parties should be permitted to apply for private relief at the foot of a decree entered in a Government suit. 15 U.S.C. § 16. * * * Intervention, if allowed here, would tend to defeat the policy behind the distinction drawn by section 16 between litigated decrees and consent decrees.

In United States v. Bearing Distributors Co., 18 F.R.D. 228 (W.D. Mo.), the court similarly denied intervention that was sought in order to secure enforcement of a consent judgment entered in a government antitrust action. The court, per Mr. Justice Whittaker (then a district judge), observed that the applicant's purpose was to "assume prerogatives of the Attorney General," and that in the action "instituted by the Government for public protection" the United States represented the applicant's interest (18 F.R.D. at 231).

In the instant case, three prior applications for intervention have been denied. Unreported order entered January 25, 1949 (Civ. 13-95, S.D. N.Y.); United States v. ASCAP, 11 F.R.D. 511 (1951); United States v. ASCAP, 1956 Trade Cases, par. 68, 524 (S.D. N.Y.). In the 1951 ruling, the court said (11 F.R.D. at 513):

The protection of the public interest rests upon those officials whose special responsibility and duty it is to enforce the laws. To permit intervention by private citizens, whose purpose in the main is self interest, in proceedings instituted by the Government is more likely to hinder rather than help in the enforcement of laws.

In numerous other cases, intervention for the purpose of modifying, implementing or enforcing the relief against defendants in government civil antitrust actions has been denied. Indeed, we are aware of no case in which, over the opposition of the United States, intervention was allowed under Rule 24(a) or its predecessors as a matter of right.

¹⁷ United States v. Radio Corporation of America, 3 F. Supp. 23 (D. Del.); United States v. General Electric Co., 95 F. Supp. 165 (D. N.J.); United States v. Loew's, Inc., 136 F. Supp. 13 (S.D. N.Y.); United States v. Paramount Pictures, 134 U.S. 131, 176-178. See United States v. Radio Corporation of America, 186 F. Supp. 776 (E.D. Pa.), appeal dismissed sub nom. Westinghouse Broadcasting Co. v. United States, 364 U.S. 518.

States, 312 U.S. 502, as an exception, since there intervention was granted pursuant to an express right of intervention given by the court's earlier judgment and was in "vindication of the decree" (312 U.S. at 508). See supra, pp. 31-32.

The appellants attempt to distinguish these cases on the ground that there the prospective intervenors were attempting to vindicate a private interest, whereas here they purport to represent the public interest. But the policy underlying the consistent rejection of attempts by private persons to intervene as plaintiffs in government antitrust suits are even stronger where the intervenor's objective is primarily to substitute its views for those of the government as to how the public interest can best be served, rather than to promote its own private interests. For the issue of how effectively the government is furthering the public interest by the manner in which it is conducting a particular antitrust case is, by its very nature, not susceptible of judicial evaluation and determination. It rests on so many intangible factors as to preclude the kind of judicial scrutiny that Rule 24(a)(2) requires as a basis for the determination whether the representation of the applicant's interest by the parties is "inadequate." In other . words, the "interest" of the applicant that may be protected by intervention under Rule 24(a) is his personal or pecuniary interest, and not his interest in purporting to speak for the public interest represented by the government. Certainly, private individuals and companies cannot be permitted to intervene in public antitrust suits brought to trial, or to have a directory role in the conduct by the government of the trial. That would, indeed, be an extraordinarily novel and disturbing practice.

3. The same considerations apply with respect to efforts to intervene in opposition to proposed antitrust consent judgments. Sometimes the government is willing to settle an antitrust case for relief that is somewhat narrower than that requested in the complaint, or that certain of the interested parties may believe would best serve the public interest. But that fact alone does not render the government's representation of the public interest inadequate. On the contrary, a favorable settlement frequently is more in the public interest than litigating a case to judgment in the hope of obtaining somewhat broader relief. Weaknesses in the legal theory or deficiencies in the proof may reasonably indicate to the government that a settlement providing a substantial measure of immediate relief is preferable to protracted litigation to an uncertain outcome. Moreover, the government may have doubts whether, even if all its legal theories were accepted and it fully proved its case, the court would grant the full measure of relief requested. These factors—and the many others upon which the government's decision whether to accept a proposed consent judgment rests-are obviously neither capable of, nor appropriate for, judicial evaluation. They are, therefore, not proper bases for determining whether the alleged "inadequacy" of the settlement in protecting the public interest renders the government's representation of such interest so "inadequate" as to warrant intervention by private parties allegedly seeking to protect that same interest. But under the appellants' theory of intervention, that

is precisely the kind of inquiry that the courts would be compelled to undertake in passing on intervention applications.

Other equally serious problems are involved where private parties attempt to intervene to block a consent decree. Their mere admission as a party may enable them to prevent acceptance of the proposed decree, regardless of the views of the other parties or of the court. Thus, once they become parties to the case, they presumably also are necessary parties to a consent settlement. Furthermore, as parties they may have the right to introduce evidence, and if they insist on that right, the defendants are unlikely to enter into a consent decree. For Section 5 of the Clayton Act (15 U.S.C. 16), which makes decrees in government antitrust suits prima facie evidence in a private suit of the violations determined in the government case, is inapplicable "to consent judgments or decrees entered before any testimony has been taken." Here, ASCAP stated that, if evidence were introduced, it would withdraw its consent to the judgment (R. 371). Permitting intervention in opposition to consent decrees would, therefore, as a practical matter, seriously interfere with the consent judgment program which plays a major role in antitrust enforcement.

This problem is not solved by appellants' contention (Br. 64-68) that, even if they could thus block a consent settlement here, the government would still be able to seek a litigated modification of the decree under the powers reserved to it by Article XVI of the 1950 judgment (R. 47) or general equitable

principles." For at a minimum the appellants' position means that, regardless of the public interest in settling the case promptly on favorable terms, the private intervenor may, by fiat, block any immediate improvement in the situation.

4. The record fully supports the district court's finding that the "representation of the public and the [appellants] was adequate and in the public interest" (R. 489). As set forth in the Statement (supra, pp. 10-19), the amendments made significant improvements in six important areas in which the 1950 judgment had proven deficient. We submit that the activities of the Department of Justice in achieving these substantial improvements fully and capably represented the public interest for which the appellants were purporting to speak.

The appellants challenge the adequacy of the government's representation of their interest primarily on the ground that in two of the six aspects in which the 1950 judgment was changed—the voting provisions and the procedures adopted for insuring a fairer survey of the performances of members' compositions—the amended decree fails to protect the smaller publishers as against the larger ones (see App. Br. 41–55). We show below that the appellants' characterization of the amended decree as "wholly inadequate either to eliminate the control by the dominating publishers of the voting and the affairs of the Society, or to secure protection for the ASCAP general membership from the anticompeti-

¹⁹ But see United States v. Swift & Ca., 286 U.S. 106.

tive activities of these publishers" (Br. 17; see Br. 40) is incorrect. But a more basic flaw in the appellants' position is their failure to recognize that the adequacy of the decree in accomplishing the purposes of the antitrust suit cannot be measured merely by the two particular provisions they attack, but requires consideration of the decree as a whole. Thus viewed, we think that, as the district court stated (R. 666), "the decree does represent definite improvement over existing procedures and that it will serve to advance the antitrust purposes of the Government suit and of the prior decrees."

In attacking the adequacy of the decree, the appellants pay little or no attention to what the district court characterized as "the most significant change in the consent judgment" (R. 664), namely, the modification in the basic distribution formula to give the younger and newer authors and publishers a fairer share of the ASCAP revenues, largely at the expense of the so-called "controlling group." These modifications, including the option afforded members to receive all of their revenues upon the basis of current performances, the scaling down of the weight given to seniority under the alternative "multiple fund" plans, and the adoption of detailed "weighting rules" significantly limiting the discretion of the Board in assigning credit values to different types of performances (R. 664-665, 670-674, 680-714), were correctly described by the district court as "a substantial. improvement over the present methods" (R. 664).

Nor can the appellants' efforts to minimize the significance of the substantial improvements in voting

procedures and in the performance surveys withstand analysis. It is quite true that the ASCAP internal organization has not been "democratized" to the extent proposed by the appellants. * But that fact does not establish that the betterments in the voting system were so insubstantial as to require rejection of the amended judgment. The maximum voting strength of the top ten publishers and their affiliates was cut from 63 percent to 41 percent (R. 219, 375), the maximum number of votes of any one member was limited, the basis of voting was changed from income receipt to current performance of compositions (thus favoring the newer members over the older ones), and provisions were adopted guaranteeing any group of members casting one-twelfth of the vote the right to name their own representative as a member of the Board of Directors. Plainly, these are not insignificant or minimal improvements in the voting system. It is no answer to these important changes to say, as the appellants do, that the percentage of votes cast by

The government told the district court (R. 321-322) that, as its negotiations with ASCAP progressed, it concluded that it "wouldn't be appropriate or fair to go any further" in changing the voting rights of the members, such as to give "one vote for each member." Government counsel stated (ibid.) that "there is very much substance to ASCAP's argument that those who over the years have done the most for ASCAP are entitled to be recognized as its elder statesman," since "[w]hen ASCAP goes around selling its catalog, most music users are attracted primarily because it contains the works of Hammerstein and Berlin and Kern and Gershwin and its other great writers"; and that "to give every member an equal vote * * * would deliver the control of ASCAP into the hands of hundreds or thousands of very small members, many of whom I have heard characterized as amateur songwriters."

the larger publishers may be increased as a result of disinterest upon the part of the group for which appellants purport to speak, or that the members of this same group (which even under the appellants' calculations will cast about half the votes) are so antagonistic to one another that there is no real chance for any utilization of the provision permitting one-twelfth of the membership to name a director. For if these are the facts, they are the result not of any deficiencies in the decree, but of the character of the ASCAP membership and the various conflicting pressures and interests among the members. Moreover, the claim that the members will be unable effectively to utilize the procedure by which one-twelfth of the membership can select its own director is refuted by the fact that, at the last annual election, two members of the Board were selected by this process (App. Br., n. 30, pp. 47-48)°.

Similarly, the fact that the operation of the new survey, prepared by outside consultants and supervised by an "independent and impartial adviser * * "" appointed by the district court (R. 664)," will continue to be under the direction of the ASCAP Board, does not mean that no substantial improvement in the existing situation can be expected. There are, of course, real mechanical difficulties in extrapolating performance information from a sampling of local

²¹ Although the district court appointed two advisers, only one of them (former State Supreme Court Justice McGeehan) is serving. The decree provides only for the appointment of an "independent and qualified person or firm" (R. 668).

radio station operations, and admittedly the signiffcantly increased sampling, backed by station logs, may nevertheless prove to be inadequate. That is why an 18-months' trial period of the new system was provided. But the appellants overlook the extremely important fact that the modified decree, to help the "smaller members" who allegedly secure a high proportion of their performances on local programs, requires a radical revision of the existing system so as to insure that this source of performance credits is given a weighting in deriving overall performance figures equal to the high percentage of ASCAP's revenues for which they are actually responsible (see R. 669). In addition, the independent supervisor of the survey is to make periodic examinations of its "design and conduct" and "estimates of the accuracy of the samples," and to report thereon to the court and the parties (R. 661-662); and after 18 months the United States is authorized to "seek additional relief in respect to * * * the scope, size or accuracy of the survey" (R. 669). If the survey actually turns out to have the deficiencies that the appellants fear, that fact should soon become known and the government will shortly be able to seek further relief to correct the defects.

The short of the matter is that the decree as a whole provides substantial and significant improvements in the 1950 judgment, and goes a long way toward correcting the deficiencies thereunder. Indeed, even in the two principal areas which the appellants single out for

their major criticism, the improvements are far-reaching and important, and plainly in the public interest. Of course, a decree such as this, entered on consent after the parties have engaged in protracted bargaining which necessarily involved considerable give and take on both sides, may not achieve as much as a decree entered in a litigated case in which the government has won a complete victory. But that is no basis for concluding that the relief obtained here is so deficient that the government's representation of the public interest must be deemed adequate. And, of course, the determination that the public interest will be served by settling the case for something less than might be obtained through litigation is, necessarily, a matter within the discretion of the Attorney General, not subject to judicial scrutiny and re-evaluation.

Judge Ryan, who had become familiar with the problems of ASCAP as a result of ten years' experience in administering the 1950 judgment, recognized that the 1960 judgment is "not a panacea for all the alleged ills besetting the Society" (R. 666). Obviously, no decree entered on consent could solve all of ASCAP's problems or satisfy all of its members. But this decree, which the government believed represented the "absolutely outermost limits" that could be achieved through negotiation (R. 321), does, as Judge Ryan held (R. 666), "represent-definite improvement over existing procedures and * * * will serve to advance the antitrust purposes of the Government suit and of the prior decrees."

B. The Appellants Are Not Bound by the 1960 Judgment so as to Preclude Them From Obtaining Further Relief Against ASCAP With Respect to the Areas in Which They Claim the Judgment is Inadequate.

The district court's denial of intervention may alternatively be sustained on the ground that the appellants also failed to satisfy the second condition for intervention as of right under Rule 24(a)(2), namely, that "the applicant is or may be bound by a judgment in the action."

1. The 1960 judgment, like the early 1941 and 1950 judgments (R. 27, 35), was entered "without * * adjudication of any issue of fact or law herein and without admission by any party in respect of any such issue" (R. 667). Since the 1960 judgment did not adjudicate any of the factual or legal questions involved in the antitrust suit, the only way in which the appellants are or may be bound by that judgment is to the extent that, as members of ASCAP, the judgment might bar them from obtaining relief against ASCAP. Whether a judgment "binds" an applicant for intervention in this sense must be determined, of course, on the basis of the particular claims or defenses that the applicant actually sought to assert through intervention.

The appellants did not seek intervention to oppose the amendments to the judgment as too severe, or to assert that ASCAP was not vigorous enough in opposing the government's demands for modifications. Had that been the case, the appellants might well have been bound by provisions that went beyond what they deemed proper. Here, however, intervention was sought because of the appellants' belief that the judgment did not go far enough in protecting the interests of the smaller members of ASCAP vis-à-vis the controlling group, and that more stringent requirements were necessary (App. Br. 13, 41–55).

The amended decree, however, does not bar the judicial imposition of additional requirements or restrictions upon ASCAP in any action that the appellants might bring against it. See Sutphen Estates, Inc. v. United States, 342 U.S. 19; Credit Commutation Co. v. United States, 177 U.S. 311. The decree does not purport to set maximum limits on what ASCAP may do to correct any deficiencies in its internal operations and in the relationships among its members. It merely specifies certain minimum standards that ASCAP must meet.

For example, in the two areas where the appellants principally object to the amended decree—voting and the survey—the judgment plainly imposes minimum rather than maximum standards. Thus, Section IV of the 1960 judgment (R. 674-676) specifies various procedures that ASCAP is to follow in carrying out the provisions of the 1950 judgment (R. 45) which, in rather general terms, govern the election of directors. The 1960 judgment does not, however, preclude the adoption of further changes in voting designed to carry out the stated purpose of

the voting provisions of the 1950 judgment of "insur[ing] a democratic administration of the affairs of defendant ASCAP" (R. 45)."

Similarly, the survey provisions (R. 668-670) of the 1960 judgment merely direct ASCAP to conduct "a census and/or scientific sample of the performances of compositions of its members * * * [to] be made in accordance with the design made and periodically reviewed by an independent and qualified person or firm" (R. 668), and specify certain standards that ASCAP is to follow in conducting such survey and in calculating the members' respective distributions (R. 668-669). Moreover, the judgment expressly provides that, after 18 months of operating experience, the government "may seek additional relief in respect to * * * the scope, size or accuracy of the survey" (R. 669). Plainly it does not bar any changes or improvements in the conduct of the survey that may be deemed appropriate.

In short, the 1960 decree "is not res judicata of the rights sought to be protected through intervention"

²² The only possible exception to this is with respect to the appellants' suggestion, during the hearing before the district court, that one appropriate substitute for the allegedly inadequate voting procedure authorized by the decree would be to have four directors elected by the large publishers, four by the medium-sized publishers, and four by the smaller publishers (R. 376). While the decree does not require ASCAP to weight its votes, if it chooses to do so it must, in the absence of a further court order, operate in the manner prescribed. But the appellants' suggestion for establishing three classes of publishers, each of which would elect four members, does not appear to require any weighting. Moreover, the appellants do not seem to object to the weighting provisions required by the decree insofar as they would apply within any of the three groups of publishers that they propose.

(Sutphen Estates, Inc. v. United States, 342 U.S. 19, 21). The appellants are accordingly not "bound" by the judgment within the meaning of Rule 24(a)(2). See 4 Moore's Federal Practice, 2d ed., § 24.08.²³

2. The decree does not purport to, and does not, bar private suitors from maintaining an antitrust action against ASCAP. A decree in a private antitrust suit does not bar the government from maintaining its suit, and by the same reasoning a decree in a government suit does not bar a private action. See *United States* v. Borden Co., 347 U.S. 514. There, in rejecting the argument that an injunction obtained in a private antitrust suit bars the government from obtaining an injunction in its suit against the same practices, the Court pointed out (p. 518) that "[t]hese private and public actions were designed to be cumulative, not mutually exclusive. * * * 'Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other.'"

This view is supported by the history of Section 5 of the Clayton Act, which makes adjudications of liability in civil or criminal antitrust actions brought by the government *prima facie* evidence of hability in a subsequent private action under Section 4 or Section 16 of the Clayton Act. At the time the section

²² The fact that a party is directly affected by a decree, which is not res judicata in any action he might subsequently bring, does not warrant intervention as of right, since "the protection afforded by intervention of right is not essential to one who will have another legal remedy available after judgment." United States v. Wilhelm Reich Foundation, 17 F.R.D. 96, 101 (D. Me.), affirmed sub nom. Baker v. United States, 221 F. 2d 957 (C.A. 1), certiorari denied, 350 U.S. 842.

was under discussion in the Congress, it was recognized that a judgment in favor of a defendant in a government antitrust action would not bar an injured private party from subsequently bringing his own action. Consideration was given to making such a judgment prima facie evidence in a subsequent private suit that the defendant had not violated the law. See, e.g., 51 Cong. Rec. 13854-13855. The Congress refused to adopt this proposal, however, because it believed that this would deprive the private citizen of his day in court (ibid.). We believe it clear that if a private action is not foreclosed where the government has litigated but lost, it cannot be foreclosed because the government has entered into a consent decree with the defendant. For if the appellants have any valid claim against ASCAP under the antitrust laws, that claim cannot be destroyed by ASCAP's acceptance of a consent judgment in the government suit.

It may be, as the district court appeared to believe (R. 295), that appellants are estopped from bringing an action against the ASCAP Board or its controlling members because of their voluntary participation in the Society as members.²⁴ Furthermore, they may be unable to prevail in such an action because they cannot show that they were injured by the allegedly re-

²⁴ Apparently, the appellants do not believe this is the case, since one of the group, Pleasant Music Publishing Corp., has brought a state court action (*Lengsfelder et al.* v. *Cunning-ham*, Index No. 13344-1957 (Sup. Ct. N.Y. County)) seeking to outlaw the ASCAP weighted rating system.

strictive practices still continuing. But these are circumstances which would exist wholly apart from the decree, and afford no basis in themselves for the claim that the appellants are bound by the decree. Similarly, it is irrelevant to the question whether they are bound by the decree that the decree might, in the absence of such further litigation by them, control their relations with the other ASCAP members as part of, the modified "constitution" of the Society.

CONCLUSION

Since the appellants had no right to intervene, this appeal from the order denying intervention should be dismissed.

Respectfully submitted.

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Attorneys.

MARCH 1961.

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Supreme Court of the United States

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SAM FOX PUBLISHING COMPANY, INC., IT AL., & Appullants

AUTHORS AND AMERICAN SOCIETY OF COMPOSIES.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 56

SAM FOX PUBLISHING COMPANY, INC., ET AL., Appellants

27

United States and American Society of Composers, Authors and Publishers, Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANTS

I

JURISDICTION AND RELIEF

The concession by the United States (Br. pp. 30-34) that the Court has jurisdiction to determine whether appellants' motion to intervene was improperly denied appears to make further discussion of that issue unnecessary. Neither the opinions of this Court nor the

Appellee United States, however, raises questions as to the nature of the further proceedings in the District Court in the event this Court concludes that appellants were improperly denied their right to intervene (Br. pp. 34-36). Referring to appellants' "failure to take any action to prevent the 1960 modifications from becoming effective" (p. 35), it is suggested that the modifications could not be set aside, and that, in effect, appellants should be remitted to a new proceeding for new or further modifications.

We are not aware of any "failure" on the part of appellants; as rebuffed intervenors, they clearly had no standing to prevent the District Court from entering the order of January 7, 1960, approving the amended consent judgment, nor to appeal from that order. Brotherhood of Railroad Trainmen v. Baltimore & O. R. Co., 331 U.S. 519, 524. Whatever is decided as to further proceedings should certainly not reflect a belief that appellants have failed to take proper steps available to them.

Appellees are not unmindful, however, of the practical problems that are involved, and we do not suggest a doctrinaire approach to their resolution. We would suggest that, in the event the court determines that appellants should have been permitted to intervene prior to the District Court's decision approving the proposed modifications, the matter should be remanded to the District Court to determine the extent to which the proposed modifications of the 1950 judgment should remain temporarily operative until the appellants have had their day in court. This course would avoid the difficulties which appellee United States en-

visages and would permit the necessary decision on a the matter to be made by the court most familiar with its practical and procedural aspects. At the same time it would avoid confronting appellants with a fait accompli and would permit a full hearing on full facts on the issues which appellants earlier sought to have resolved.

II

THE GOVERNMENT ADVANCES NO PERSUASIVE GROUNDS FOR CONCLUDING THAT ITS REPRESENTATION WAS ADEQUATE

Appellee United States strives to have the issue as to the adequacy of its representation of the interest of appellants and of the ASCAP general membership decided on general principles and without consideration of what has occurred in this case. Government ordinarily represents the public interest. as appellants have already acknowledged, the United States urges in effect that in no Government antitrust case-or, indeed, in any suit brought by the United States-could circumstances arise in which Federal-Rule 24(a)(2) would have applyability. We do not believe that this Court intended the field of Government litigation to be wholly outside the reach of this provision of the Federal Rules. On the contrary, Rule 24(a)(2) has an important function in this area; it provides a corrective procedure when Government agencies plainly fail to discharge their duties in litigation they have undertaken, and their inadequate representation is clearly established.

Appellee United States, relying upon generalized statements characterizing the Attorney General as the representative of the public interest in all Government suits (Br. pp. 38-50), would sidestep the necessary inquiry into what actually occurred in the proceeding

in which intervention was denied. This, and not statements of general doctrine, should be the basis for resolving the issues presented in the appeal. Appellants attempted such an inquiry in their brief (pp. 40-55), and our conclusion that the representation by the Department of Justice was inadequate is not refuted in the few pages the Government has devoted to the matter (Br. pp. 51-54).

Appellants' inquiry, moreover, did not call for a subjective evaluation" of the Department's conduct in negotiating the modifications of the 1950 judgment; nor is it necessary to inquire whether the Government's representatives acted "conscientiously", or whether they "misstated the facts" (Br. pp. 37, 40). In resolving the question of adequate representation by the Government that is here presented, the Court need only analyze what the Department consented to and measure the result against the protection the ASCAP general membership should receive under the antitrust laws from the domination of the Society's affairs by the largest publishers.

By this standard the Department's representation is plainly inadequate. Thus, the Department does not explain how "'very substantial strides . .: in diminishing concentration of control" by the larger members are achieved if they are enabled to continue to

In short, contrary to the Government's belief, appellants did charge and undertook to document nothing other than "nonfeasance in [the Government's] duty of representation" of the ASCAP general membership (see U.S. Br. pp. 40-41). Indeed, appellants did not previously so label their claims out of deference to the Department of Justice, and not because of any belief that the course followed by it did not constitute "nonfeasance". Appellants recognize that the inadequacies of the representation by the Department may have resulted from the extremely complicated and technical nature of ASCAP's internal operations. This, however, is a reason for allowing the intervention by appellants who have been members of the Society for many years.

exercise a clearly dominant voting power in the Society.2. Nor does its statement that the 1960 modifi-

² In summarizing the voting provisions of the 1960 modifications the Government's brief mistakenly states that "the basis of voting was changed from income receipt to current performance of compositions (thus favoring the newer members over the older ones)" (p. 52; emphasis added). The Government has confused "current performance" with "performance credits". It is the latter that are the basis upon which a member's vote is determined under the 1960 modifications (see R. 674), and, as the record makes clear, performance credits awarded to any work now and in the future will be very much affected by the extent to which, and the "uses" for which, the work has been performed in the past. See R. 211, 332. Works that Meet the historical "use" tests set forth in the 1960 modifications will receive greater performance credits than other works. See Weighting Rules, Sec. (B) (1) et seq., R. 690-692. Thus, the apportionment of votes by "performance credits" gives no assurance of "favoring the newer members over the older ones,", and as appellants have indicated (Br. pp. 52-53), with regard to at least one type of "use", the system created by the judgment assures that the works of the largest publishers will be included in the category of works receiving greater performance credits.

Nor does the requirement of the judgment (R. 691) that a work receiving greater performance credits must also continue to secure a certain number of performance credits for "feature uses". in current years mitigate the impact of the large number of "feature" performance credits that have been accumulated over the years by the older works of the largest publishers. The brief of appellee ASCAP (pp. 50-51) implies that this provision imposes a substantial minimum requirement of "feature" performances in current years on these older works. In fact, however, the requirement imposed (2,500 feature performances over a five-year period) is so minimal that such older works, receiving greater performance credits on a historical basis are assured of achieving the minimum for current years and thus of retaining their preferred status. It is further significant that the older works of the largest publishers receive a disproportionate number of feature performances on network television and radio (see ASCAP Hearings, p. 37), and that the ASCAP survey of performances gives very great weight to such network performances, which are all reported in the survey-the average multiplier for network television being 242 and for network radio being 60 (R. 235, 236).

[Directors] may do in the area of surveys' respond to appellants' offer to prove that the Directors' control of the operations for collecting the survey data will enable them to continue to distort the ultimate results of the survey to favor certain members over others in the distribution of license revenues. Compare U.S. Br. pp. 37, 52, 53-54. These basic deficiencies in the Government's representation of the interests of ASCAP's general membership, which are unexplained in its brief, together with the others to which the motion to intervene made reference, fully warrant the conclusion that the representation by the Government was inadequate.

The salient aspects of these inadequacies are set forth in our brief at pages 41-52. One further aspect, however, warrants an additional comment in the light

of appellees' arguments. .

Appellees attempt at some length to justify the provisions in the 1960 modifications by which greater performance credits—and hence greater revenue distributions—are awarded certain defined works over others when performed for identical non-feature uses such as background, theme or jingle music. See Sec. HI(F) and "Weighting Rules," R. 674, 689 et seq. Appellee ASCAP, for example, defends a distinction which can give one work 100 times the performance credits of another performed for an identical "use" on the ground of an assumed "inherent value of the music itself," purportedly derived from the use of the music in the past (U.S. Br. pp. 14-15; ASCAP Br. pp. 8, 15).

The nature of the hearing conducted in the District Court prevented appellants from addicing proof that in fact this discrimination embodied in the 1960 modifications would have the practical result of favoring the very group of large publishers whose anticompetitive activities the antitrust action was designed to curb, and at the expense of the very members of the Society whose interests were sought to be protected. The new "Weighting Rules" that determine which works will receive greater performance credits are such as to preserve almost all of the advantage which the works of the dominant publishers had received under the anticompetitive practices of the past. See App. Br. 52-53.

Moreover, appellants also asserted in the proceeding below that this discrimination in favor of the dominant publishers permitted them to secure an even more unwarranted share of the revenues of the Society by reason of the fact that at least three of the largest publishers are subsidiary corporations of large moving. picture producers. These publishers are thus enabled to have their own works which are entitled to greater performance credits performed for "background" or other non-feature uses in moving pictures produced for television, where the performances will be reported in the ASCAP survey (DR. 1105, 1137-1138; see ASCAP Hearings, pp. 37, 233-235). ASCAP cannot, of course, prevent the moving picture companies from using the songs of their own publishing subsidiaries for non-feature uses in the films they produce, even when there is no reason for using a particular work other than that it is owned by the subsidiary. There is no basis, however, for giving the large publishers who have this opportunity an advantage of 100 to 1 when their works are so used, particularly when the Society's revenue distributions for non-feature uses are very substantial. See App. Br. p. 52n.

Appellants believe that the only justifiable reason a musical work is selected for background or other non-feature use is that it is believed by the user of the

music to be best suited for his particular purposes. When a work is thus selected and performed, it should receive performance credit on a par with any other work performed for the same "use". If it is a work which, for any reason, is particularly desirable for some non-feature use, it will be performed more often and receive more credits. The "inherent value" of a work for "background" music or other non-feature use, in other words, can only be measured by its use for this purpose, and not by its "popularity" for entirely different purposes.

III

THE 1960 JUDGMENT BINDS APPELLANTS AS MEMBERS OF THE SOCIETY

1. Both appellees assert that the 1960 judgment "does not purport to set maximum limits on what ASCAP may do to correct any deficiencies in its internal operations and in the relationships among its members", but that the judgment "merely specifies certain minimum standards that ASCAP must meet" (U.S. Br. p. 57; ASCAP Br. p. 40). They contend that the judgment does not bar ASCAP members from suing to compel the Society, for example, to eliminate the weighted voting system entirely as violative of the antitrust laws, or to prevent the Society from distinguishing in performance credits awarded to different compositions or performances. Appellees contend, for these reasons, that the judgment has no res judicata effect upon appellants as members of ASCAP.

Both the Government and ASCAP disregard significant provisions of the 1960 judgment relating to voting and the distribution of revenues in the Society which sharply proscribe the relief that appellants or

other members could secure in a private antitrust suit against the Directors and the largest publishers. Appellants could obtain no relief that is different in kind or degree from any provisions of the judgment which compel the Society to take certain specific action in the areas of its internal affairs covered by the judgment. To this extent at least appellants and other ASCAP members are bound by the terms of the modifications agreed upon by the Government and the Society's Directors.

Thus, Section IV(B) (R. 674-675) sets forth the basic voting formula that must be followed by ASCAP in allocating votes for performance credits if the Society employs any weighted voting system at all. an ASCAP member brought an antitrust suit to secure adoption of a weighted voting system under which the largest-publishers-i.e., those having the greatest performance credits-would be limited to a smaller vote, they would be met by the objection that any such relief would require alteration of the voting formula of the 1960 judgment. If an ASCAP member in such a suit were to urge that ASCAP members who seek to elect a director through the "petition procedure" created by Section IV(E) (R. 676) should not be barred from casting some or all of their votes for the remaining directors,3 they would again be informed that this relief was precluded by the specific terms of the section. The necessity for private antitrust relief that would modify these and other of the voting provisions of

³ Since an ASCAP member is ordinarily permitted to cast his total number of votes for each of the twelve publisher or writer directors (Art. Ass'n, Art. 4, Sec. 4, Par. (g); ASCAP Hearings, p. 487), members who join in the petition procedure must surrender their right to vote for the eleven directors other than the director for whom they petition.

Section IV would loom large in a private suit if it should develop that the weighted voting system could not be eliminated entirely by reliance upon the anti-trust laws.

Similarly, provisions of the judgment that control the distribution of license revenues could not be altered in private antitrust litigation. Members seeking private antitrust relief in this area of the Society's internal affairs would be restricted to an attempt to eliminate all "distinctions as to the amount of credit given to various works or performances" since no such distinctions may be made by ASCAP except as specifically set forth in the part of the 1960 modifications entitled "Weighting Rules". See Sec. III(F), R. 674; and R. 689 et seq.

These restrictions upon relief that could be secured in a private antitrust suit would stem not only from the Court's decision in Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, to which we have referred (App. Br. pp. 60-62), but also from Sovereign Camp, Woodmen of the World v. Bolin, 305 U.S. 66. There the Court held that the decision in a prior suit by a policyholder against an unincorporated insurance association to determine the lawfulness of certain provisions of its insurance policies was res judicata in a subsequent suit by another member involving those same provi-The Court stated that in the prior suit the association represented all its members and stood in judgment for them, "and even though the suit had a different object than the instant one it is conclusive upon all the members of the association with respect to all rights, questions, or facts therein determined". 305 U.S. at pp.-78-79.

2. There is no merit to the argument of appellee ASCAP (Br. p. 39) that appellants could not be in-

adequately represented by the existing parties in the proceeding in the District Court and at the same time bound by the 1960 modifications as members of the Society. The argument neglects the plain language of Rule 24(a)(2) which contemplates that both requirements of the Rule be met by an applicant intervenor. Since the Rule may be invoked only if the applicant is already represented in the litigation, and the representation must be such as would bind the applicant. ASCAP's interpretation of the Rule would preclude it from ever being applied. °

Further, ASCAP's reliance upon Hansberry v. Lee, 314 U.S. 32, is misplaced. There the antagonistic members of the class or group that was purported to have been represented in a prior suit had interests that could be severed from the interests of the other members, and the Court could accordingly rule that there was no "single class". Because the interests of the "class" were severable, the judgment in the prior suit could be given full effect against those persons who were named as parties to that proceeding. 311 U.S. at p. 44.. Here, however, all the ASCAP members are, by virtue of their membership status, inextricably joined together and must abide by the terms of the 1960 judgment against the Society just as shareholders must abide by a judgment against their corporation, if the judgment is to operate at all. 'The alternative for a dissenting member is to resign from the Society. which is a course that is neither practical nor desirable. as we have already indicated (App. Br. pp. 33-34).

[.] The state court action to which appellees refer. (U.S. Br. n. 60; ASCAP Br. p. 39), Lengsfelder v. Cunningham, Index No. 13344-1957 (N.Y. Sup. Ct.), that was brought in 1957 by one of the appellants and other ASCAP members against the Society's Directors and officers, does not indicate that that appellant did

IV-

ASCAP'S DISPUTE WITH THE FACTUAL REFERENCES CITED BY APPELLANTS

Appellee ASCAP objects to appellants' reliance in the District Court, and in this Court, upon factual references from the record and from the ASCAP Hearings conducted by the Subcommittee of the Select Committee on Small Business of the House of Representatives (Br. pp. 46-54). Wherever possible, appellants relied upon information in the record or in the ASCAP Hearings which was either undisputed by anyone or which was supplied by the Society's Directors. Necessarily, however, in seeking to establish that they were inadequately represented, appellants also were required to rely upon factual assertions which were in dispute but with respect to which they were fully prepared to adduce competent testimonial and documentary evidence at the hearing in the District Court. It is as to these assertions that appellants made offers of proof, and an opportunity should be afforded them to prove their claims. Cf. Pyle-National Corp. v. Amos, 172 F. 2d 425, 427 (7th Cir. 1949).

Indeed, the position of ASCAP is quite inconsistent.

In a "Memorandum in Support of Proposed Consent

not consider itself bound by the terms of the 1950 judgment, which was then in effect. Indeed, Paragraph 56 of the Second Amended Complaint filed April 9, 1958, the allegations of which are admitted by the defendants in their Answer, acknowledges the binding effect of the antitrust judgment upon the plaintiffs as members of the Society and upon the Society itself. Moreover, the Lengsfelder case seeks no relief against the Society that is in any way inconsistent with the 1950 judgment, but rather includes a claim that the Society's Directors were not abiding by the voting provisions of the judgment. In any event, the litigation has not progressed beyond the procedural stage, and the impact of the 1960 judgment upon the case is yet to be determined.

Further Amended Final Judgment" (R. 119-146), the Department of Justice made many factual assertions upon which the District Court must have relied, else it would have had no basis whatever for deciding whether to approve the 1960 modifications. opinion on the proposals, the District Court sometimes refers to these factual statements by the Department of Justice as "alleged" (see, e.g., R. 665-666) or as . "claimed" (e.g., R. 663), but in other instances (e.g., R. 665 on the "Weighting Rules") restates the Government's assertions as facts. ASCAP also leaves unexplained just how the District Court could state (R. 663) that "ASCAP does not admit any of the Government allegations", and yet, after delivering its opinion, state in response to a comment from counsel, "I find no factual dispute here (R. 589). What is not obscure is that ASCAP was willing to have the Department of Justice make factual representations, even though it disagreed with them, and indeed was willing to make factual representations of its own (e.g., R. 305, 347, 351-352), but was and is unwilling to have appellants lay before the District Court further facts which are relevant to the question which it was called upon to decide—whether the proposed modifications will accomplish the antitrust purposes of the suit. Evidently ASCAP is satisfied to rely upon only certain facts developed in the proceeding below and in the Congressional Hearings, (e.g., ASCAP Br. pp. 33, 44, 49, 51), but no others.

ASCAP is not disturbed about asserting "facts" which are based upon information to which the Directors alone are privy. Citing no source, ASCAP, states that in the recent election for the Board of Directors the ten largest publisher groups "had only 31.88 per cent of the eligible votes." (Br. p. 53). Anticipating that the Directors might seek to make exactly such unilateral

Certainly, appellee ASCAP's citation to factual references which purportedly controvert those relied upon by appellants can establish no "facts". Rather, any

use of the voting records relating to the election, appellants earlier formally requested information that would have permitted an independent evaluation of the extent of the voting power that was held and exercised in the election by the ten largest publishers. Counsel retained by the Directors refused appellants' request in its entirety, and appellants have thus had no opportunity to analyze the bare assertion in the ASCAP brief. A further request for an explanation of the figure cited in the brief was unavailing. See Appendix, pp. i-vi. Even without the information appellants had requested in order to evaluate accurately the voting. strength of the largest publishers in the last election, the figure cited by ASCAP is of questionable probative value in this appeal. The recent election for Directors took place while the appeal was pending: It is doubtful that in this period the ten largest publishers would have acted to enhance their voting power to the maximum of 41 percent authorized by the 1960 judgment. An inquiry might well disclose that steps were taken to decrease the voting power of these publishers somewhat.

6 Particularly when the factual references are inaccurate. Thus, contrary to the statement in the ASCAP brief (p. 53), it appears that newly-elected director E. H. Morris, an officer of one of the ten largest publishers (R. 275-276), has served on the Society's Board of Directors in the past (see ASCAP Membership Directories dated January 1 and August 31, 1937, and April 1, 1939), and indeedas appellants are prepared to show-was then the representative of. the group of publisher member affiliates that has been the largest in the Society for many years, the "Warner Group" (R. 276). And ASCAP's reference (Br. p. 44) to an early proposal participated in by an officer of one of the appellants (before that appellant, a publishing company, was formed), that some of the Society's revenues be distributed to writers on the basis of length of membership disregards the clear statement that such payments were to be made only to writer members whose works had received a certain minimum of performances (ASCAP Hearings, p. 390): The proposal, moreover, was part of many other suggested revisions in the Society's system of distributing writer revenues that were considered by a committee of writer members; the committee accomplished nothing because of the opposition of the Society's Directors (ASCAP Hearings, pp. 94-95, 686).

factual dispute between the parties is of significance to this appeal primarily because it highlights the need for an adequate evidentiary hearing in the court below as to whether the challenged provisions of the 1960 judgment should be adopted.

CONCLUSION

For the reasons set forth in the briefs for appellants, the order of the District Court denying appellants' motion to intervene pursuant to Rule 24(a)(2) should be reversed, and the case remanded to the District Court for further proceedings.

Respectfully submitted,

CHARLES A. HORSKY
ALVIN FRIEDMAN
701 Union Trust Building
Washington 5, D. C.
Attorneys for Appellants
Sam Fox Publishing Company, Inc.
Pleasant Music Publishing
Corporation
Jefferson Music Company, Inc.

Covington & Burling
Of Counsel

March, 1961

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APPENDIX

COVINGTON & BURLING

January 21, 1961

Arthur H. Dean, Esq. Sullivan & Cromwell 48 Wall Street New-York 5, New York

Dear Mr. Dean:

In connection with the pending appeal before the Supreme Court in Sam Fox Publishing Company, Inc., et al. v. United States and ASCAP. No. 56, October Term 1960, appellants believe it, would assist the Court in its consideration of the appeal to have before it information relating to the recent balloting for ASCAP. Directors by the members of the Society under the provisions of the 1960 judgment entered by Judge Ryan. I am therefore submitting to you as counsel for the Society appellants' request for the following information:

- 1. State the breakdown of the total possible vote, and the votes actually cast, in the 1960 election by writer and publisher members respectively. This information could perhaps most readily be supplied in the form indicated by the table on page three of the letter by Mr. Howard Milman to Mr. Herbert Chevette, dated September 4, 1959. To keep the figures consistent with the prior tabulation, it would probably be desirable to include among the votes cast the ballots which were improperly voted and improperly signed, but to state separately the ballots invalidated.
 - 2. State the total publisher revenue distributed for 1959 and 1960 (for the latter year to the extent available).
 - 3. With regard to each of the 36 publisher members of the Society (defined as the publisher member and its affiliates) casting the highest number of publisher votes in the 1960 election, state separately the revenue distribution for 1959 and 1960 (for the latter year to the extent available), the amount of performance credits upon which

each publisher's votes were calculated, and the votes cast by each in the recent Board election for ASCAP Directors, in a form such as the following:

Name of Credits Upon
Designation 1959 1960 Which Votes Votes of Publisher Revenue Revenue Were Based Cast

- 4. If the Carl Pisher and G. Schirmer companies are not among the publishers listed in response to paragraph 3, state for each of these companies the information requested in paragraph 3.
- 5. State the publisher members, and the votes cast separately by each, who voted pursuant to Section IV(E) of the 1960 judgment for the election of Messrs. E. H. Morris and Bernard Goodwin, respectively, as members of the Society's Board of Directors.

I would be happy to discuss the above request for information with you at your convenience. Please do not hesitate to telephone me if there is anything that is not clear about the information requested.

Yours very truly,

CHARLES A. HORSKY

ce: The Solicitor General of the United States Washington 25, D. C.

> SULLIVAN & CROMWELL 48 Wall Street, New York 5,

> > January 26, 1961

Charles A. Horsky, Esq. Messrs. Covington & Burling Union Trust Building Washington 5, D. C.

Dear Mr. Horsky:

I have been out of town and did not see your letter of January 21st until today.

It seems to me that your appeal in Sam Fox Publishing. Co., Inc. et al. v. United States et al. presents the legal question whether your clients were entitled to intervene as of right in the District Court, and that there is no factual issue to be resolved in the Supreme Court. The record made in the District Court should be adequate to present the legal question.

I should point out that your request for information on the voting of members at the last election raises a very serious problem. You will recall that at the hearing before Chief Judge Ryan, you argued in connection with the provision whereby members with 1/12th of the eligible writers' and publishers' votes could elect a director:

"This would be publicly done, not privately done— with the possibility of reprisals, the possibility of all sorts of things of that nature—" (Record on Appeal, p. 378).

In response, I assured the Court that ASCAP would

"... arrange for these members who wished to get up such a petition to sign it secretly ... so that there won't be any fear of reprisal." (Record on Appeal, p. 466)

I understand that the ballots have been sealed and that the information which you request is not disclosed to the officers or directors of ASCAP, and I believe should not be disclosed.

Nor do I think it would be proper for ASCAP to make public the amount of its distribution to individual members. The Judgment entered by Judge Ryan carefully provided that the ASCAP records containing such information shall be open for inspection by a member only for good cause.

Judge Ryan's decision was based upon the record before him. I do not believe that the Court would be assisted in its consideration of the legal question presented by roing outside the record in the manner you suggest. I should think it would be a mistake if the parties to the appeal were to start offering new evidence in the Supreme Court not only on this but other subjects.

I should, of course, be happy to discuss this matter with you further if you so desire.

Very truly yours,

/s/ ARTHUR H. DEAN Arthur H. Dean

cc: The Solicitor General of the United States, Washington 25, D. C.

COVINGTON & BURLING

March 14, 1961

Howard T. Milman, Esq. Sullivan & Cromwell 48 Wall Street New York 5, New York

Dear Mr. Milman:

Although I understood that my request for information addressed to Mr. Dean on January 21, 1961 comprehended the information I now desire, I would be very much obliged if you would supply to me the information referred to on page 53 of the brief for ASCAP in the Supreme Court, which you state has been supplied to the Department of Justice and on the basis of which the figures contained in the brief at page 53 were calculated. Needless to say, I should like the information as promptly as possible.

Very truly yours,

(Signed) CHARLES A. HORSKY

CAH/eg ce: Archibald Cox, Esq. SULLIVAN & CROMWELL 48 Wall Street, New York 5,

March 15, 1961

Charles A. Horsky, Esq., Messrs. Covington & Burling, Union Trust Building, Washington 5, D. C.

Dear Mr. Horsky:

In response to your letter of March 14, 1961, the information you request is as follows:

The total number of publisher votes eligible to be cast at the last election of directors was 5,197. The aggregate number of votes eligible to be cast by the total. The aggregate number of votes eligible to be cast by the Schirmer and Fisher groups was 76, or 1.47% of the total.

Very truly yours,

Howard T. Milman Howard T. Milman

cc: Hon, Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C.

COVINGTON & BURLING

March 16, 1961

Howard T. Milman, Esq. 18 Wall Street New York, N. Y.

Dear Mr. Milman:

Pursuant to our conversation this morning, this letter ets forth the questions we considered on the telephone with respect to the voting in the last ASCAP election by he top ten publisher groups. We would like to obtain the names of the top tenpublishers referred to on page 53 of the brief for ASCAP in the Supreme Court.

We would also like to be informed of the breakdown of the eligible votes held by each of the above top ten publishers in the last election for the Board of Directors.

Finally, I inquired whether the reference to the "aggregate number of votes eligible to be cast" by the top ten publisher groups included the votes of any such publishers that were cast for a candidate to the Board of Directors under the petition procedure created by Section IV(E) of the 1960 judgment.

Yours truly,

ALVIN FRIEDMAN

rmw

SULLIVAN & CROMWELL 48 Wall Street, New York 5,

March 17, 1961

Alvin Friedman, Esq., Messrs. Covington & Burling, Union Trust Building, Washington 5, D. C.

Dear Mr. Friedman:

This will acknowledge your letter of March 16, 1961.

As I indicated in our telephone conversation, we see nothing which would justify the disclosure of confidential information as to the votes of individual publishers.

With respect to the "aggregate number of votes eligible to be cast", these votes could be cast either under the petition procedure or in the general election of directors, at the option of the member.

Yours truly,

Howard T. Milman Howard T. Milman

SUPREME COURT OF THE UNITED STATES

No. 56.—October Term, 1960.

Sam Fox Publishing Company, On Appeal From the United States District Court for the Southern District of New York.

[May 29, 1961.]

Mr. Justice Harlan delivered the opinion of the Court.

The appellants, proceeding under the Expediting Act, 15 U. S. C. \$29, appeal directly to this Court from an order of the District Court for the Southern District of New York denying their motions to intervene as of right in a proceeding to modify a consent decree previously entered in a government antitrust suit. The appellants were not named as parties either in the suit or modification proceeding. The motions were made pursuant to Rule 24, subdivision (a)(2) of the Federal Rules of Civil Procedure.

The matter arises in the following setting: In 1941 the United States brought suit under § 1 of the Sherman Act.

The appellants also moved below for permissive, or discretionary, intervention under subdivision (b) of Rule 24, but no appeal has been taken from that part of the District Court's order.

¹ Besides Sam Fox. Publishing Company there are two other appellants, Pleasant Music Publishing Company and Jefferson Music Company who, like Sam Fox, are music publishers. Although Movietone Music Corporation also appealed, it did not appear in this Court.

^{2&}quot;(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action . . ."

15 U. S. C. § 1, against the American Society of Composers, Authors and Publishers (ASCAP), an unincorporated association of which appellants are members, and certain of its officers. The Society and the defendant officers besides being named as an entity and individuals, respectively, were also sued as representatives of all members of the Society. The Society, comprising some 6,400 writers and publishers of musical compositions, was organized to take nonexclusive licenses to the works of its members, to license such works out for public performance, and to distribute among the members the revenues resulting therefrom. The three appellants are among the Society's publisher members.

The Government's complaint in the action was aimed. at two distinct types of antitrust violation: (1) alleged restraint of trade arising out of ASCAP's mode of dealing with outsiders desiring licenses of compositions in the Society's catalogue; and (2) alleged restraint of competition among the Society's members inter sese, resulting from the asserted domination of the Society's affairs by a few of its large publisher members who, it was claimed, were able to control the complexion of the Board of Directors and the apportionment of the Society's revenues. As to the latter type of restraint, the prayer for relief sought to insure (a) that Board elections be by no method "other than by a membership vote in which all ... members shall have the right to vote." and (b) that the distribution of revenue to members should be on an "fair and non-discriminatory basis." It is apparent from the record that appellants' particular interests in the suit related entirely to the second aspect of the Government's charges, that is those involving the Society's internal affairs, and that their motions to intervene were so directed.

During the same year in which the suit was brought it was settled by a consent decree, approved by the Dis-

trict Court. In addition to provisions dealing with what may be called the Society's external affairs, the decree, in broad terms, contained requirements for Board elections by membership vote and for revenue distributions on an equitable basis. Subsequent to the decree, both the vote of the members and their share of license revenues were accorded on a weighted basis relative to the particular member's contribution to the revenue-producing value of all members' contribution to the Society's catalogue, E" as determined by the Board of Directors. In 1950, pursuant to a reservation-of-jurisdiction clause in the 1941 decree, a modification of the original decree was effected at the instance of the Government. The modified decree ordered, among other things, that "in order to insure a democratic administration of the affairs of defendant ASCAP . . [the composition of the] Board of Directors shall, as far as practicable, give representation to writer members and publisher members with different participations in ASCAP's revenue distributions. . . . "

In 1959: this same concern for "democratic administration of the [internal] affairs" of ASCAP and for an equitable distribution of license revenues led the Government to press for further amendments to the decree. In 1960 this resulted in additional court-approved modifications which, it is apparent, represented a substantial improvement over the earlier provisions relating to Board elections and the apportionment of revenues. Contending that the proposed modifications did not go far enough towards ameliorating the position of the small publishers as against the few large publishers, appellants, prior to the adoption of the modified decree, brought the intervention motions now before us. The District Court denied leave to intervene without opinion, stating in its order:

". . . representation of the public and the applicants by the Department of Justice was adequate and in

4 SAM FOX PUBLISHING CO. v. U. S.

the public interest; . . . applicants are members of and are represented by the Society with their consent; . . . applicants have permitted this cause in which they are not named as parties to proceed to judgment; and . . . it would not promote the interests of the administration of justice to permit the requested intervention. . . ."

Thereafter the District Court entered a judgment approving the proposed modifications to the existing consent decree. Appellants do not appeal from that judgment, but only from the order denying their motions to intervene as of right. We postponed consideration of the question of jurisdiction to the hearing of the case on the merits. 364 U. S. 801.

As the Government and appellants correctly agree, the controlling question on the issue of jurisdiction, the answer to which also determines the merits of this appeal. is whether the appellants were entitled to intervene in these proceedings as "of right." Sutphen Estates v. United States, 342 U.S. 19, where the Court said: "If appellant may intervene as of right, the order of the court denying intervention is appealable." Id., p. 20. That case requires rejection of ASCAP's separate contention that the order below was not appealable because not final.3 and also its further contention that appellate review of intervention has become moot, in that no appeal was taken from the judgment eventuating from the proceedings in which intervention was sought. The latter contention is based on the erroneous hypothesis that review of the intervention order was obtainable only in connection with an appeal from such judgment.

³ Allen Calculators, Inc., v. National Cash Register Co., 322 U.S. 137, need not be considered to the contrary, for it would seem that the significance of the appeal which was there taken from the judgment below related to this Court's jurisdiction to consider the District Court's denial of permissive intervention, and not to its jurisdiction to review the District Court's order denying intervention as of right.

The determinative question—whether appellants were entitled to intervene as "of right"—depended upon their showing both that "the representation of" their "interest by existing parties" to the consent judgment modification proceeding was or might "be inadequate," and that they would or might "be bound by [the] judgment" in such proceeding. See note 2, supra.

I.

Appellants first contend that the representation of their interests by the Government has proven inadequate. Although the most recent decree reduced and limited the Board representation of the 10 largest publishers and provided for a method of revenue apportionment more favorable than that of the past to the smaller and less well-established Society members, appellants' contention is that this amelioration of their position is not adequate to break the control of the larger publishers, and therefore the Government's representation was or may have been inadequate.

Apart from anything else, sound policy would strongly lead us to decline appellants' invitation to assess the wisdom of the Government's judgment in negotiating and accepting the 1960 consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting. However, we need not reach the question of the adequacy of the Government's representation of the appellants' interests because, as hereafter shown, it is in any event clear that appellants are not bound by the consent judgment in these proceedings, if their position in this litigation is deemed as aligned with that of the Government. See United States v. Columbia Gas & Electric Corp., 27 F. Supp. 116, 119.

We regard it as fully settled that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the even-

tuality of such litigation, and hence may not, as of right, intervene in it. In United States v. Borden Co., 347 U. S. 514, it was ruled that it was an abuse of discretion for the District Court to refuse the Government an injunction against certain acts held violative of the antitrust laws, even though the same acts had already been enjoined in a private suit. It was there stated in clearest terms that "private and public actions were designed to be cumulative, not mutually exclusive" (id., at 518), and, quoting from United States v. Bendix Home Appliances, 10 E. R. D. 73, 77, "'[T]he scheme of the statute is sharply to distinguish between Government suits. either criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other." Id., at 518-519.

This principle is certainly broad enough to make it clear that just as the Government is not bound by private antitrust litigation to which it is stranger, so private parties, similarly situated, are not bound by government litigation. See United States v. General Electric Co., 95 F. Supp. 165; United States v. Columbia Gas & Electric Corp., supra; United States v. Radio Corporation, 3 F. Supp. 23; United States v. Bendix Home Appliances, supra; cf. United States v. Loew's, Inc., 136 F. Supp. 13. Indeed §§ 4 and 16 of the Clayton Act, making an adjudication of liability in a government antitrust suit prima facie evidence of liability in a private suit, would seem to be a definitive legislative pronouncement that a government suit cannot be preclusive of private litigation, even though relating to the same subject matter.

Regarding appellants' position in the case from this aspect, we conclude that they were not entitled to intervene as of right. See Allen Calculators, Inc., v. National Cash Register Co., 322 U.S. 137, 140-141.

II.

The contention of the appellants that they are entitled to intervene because as members of ASCAP they might be bound by ASCAP's representation of their interests presents a more difficult question. Their claim is that the Society acting through its Board of Directors could not adequately represent their interests as small publishers. whose very claim is that they are caught between the practical need to remain in the Society and the impossibility of obtaining adequate representation on the Board of Directors which determines both the weighting of votes in Board elections and the distribution of Society revenues. Since the Board, which negotiated the present consent judgment with the United States, represents, in the words of the Government's complaint, the core of the very "unlawful combination and conspiracy" against which appellants seek antitrust relief, it is hardly doubtful, taking, as we think we should, the record before us at face value, that ASCAP, acting through its Board, cannot in law be deemed adequately to represent appellants' discrete interests asserted against the Board.

But before the inadequacy of ASCAP's representation of appellants' interests in the consent decree negotiations can give rise to a right of intervention, appellants must further demonstrate that they are or may be bound by the judgment on the litigation. On this score appellants argue that as "class" defendants they are bound by the consent judgment against ASCAP, an unincorporated association, which was sued both as an entity (Fed. Rules Civ. Proc., 17 (b)) and as representing all the Society's members (Fed. Rules Civ. Proc., 23 (a)(1)). See Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 148 F. 2d 403.

In so arguing, appellants, however, face this dilemma: the judgment in a class action will bind only those mem-

bers of the class whose interests have been adequately represented by existing parties to the litigation, Hansberry v. Lee. 311 U. S. 32; yet intervention as of right presupposes that an intervenor's interests are or may not be so represented. Thus appellants' argument as to a divergence of interests between themselves and ASCAP proves too much, for to the extent that it is valid, appellants should not be considered as members of the same class as the present defendants, and therefore are not "bound." On the other hand, if appellants are bound by ASCAP's representation of the class, it can only be because that representation has been adequate, precluding any right to intervene. It would indeed be strange procedure to declare, on one hand, that ASCAP adequately represents the interests of the appellants and hence that this is properly a class suit, and then, on the other hand, to require intervention in order to insure of this representation in fact. The cases establishing the principle of class suits, Smith v. Swormstedt, 16 How. 288; Supreme Tribe of Ben Hur v. Cauble, 255 U. S. 356; and see Hansberry v. Lee, supra, present no such situation and require no such result.

Any doubt that may exist in this case is dispelled once it is recognized that the Government's original complaint alleged two different types of antitrust violations, two different illegal combinations. It is doubtless true that appellants, through their membership in ASCAP, are or "may be" bound by the consent Judgment insofar as it deals with the external affairs of the Society; nor is there any claim on this score that ASCAP's representation was not fully adequate.* It does not follow from this, however,

The issue of inadequacy of representation could arise on this phase of the case only on some showing that ASCAP, which ostensibly has the same interests as appellants on this aspect of the litigation, were in fact conducting the litigation in bad faith, collusively, or negligently. No such contention has been made.

that as to the other alleged antitrust violations, which are of an entirely different nature, involving the interests of the members inter sese, that the Society itself is a valid unitary representative for this purpose also, containing as it does the principal factions in the internecine dispute. Cf. Owen v. Paramount Productions, 41 F. Supp. 557. Or, put differently, as to any claims or defenses which appellants have against the Government the representation of ASCAP is entirely adequate, and as to any claims which they may have against ASCAP there is nothing to require appellants to bring them into this litigation, simply because they are "bound" for other purposes. Cf. Fed. Rules Civ. Proc., 13 (g).

Turning to the order of the District Court, its remarks that the appellants as "members of the defendant Society ... surrendered ... (their) right to intervene as individuals," (R. 295) and that they "are members of and represented by the Society with their consent" are susceptible of two interpretations. If the Court was referring simply to the assertedly representative nature of the suit: its view was no different from the appellants' contention discussed above, and the answer to it is also the same. The purport of the order, however, appears to have been, as the District Court elsewhere intimated, that quite apart from the actual divergence of interest and position between ASCAP and appellants, the contractual and associational relation between the Society and its members, into which they were free to enter and from which they were free to withdraw, at least so far as the law is concerned, both bound appellants as privies to this judgment and precluded any claim of inadequate representation. With respect, we think this begs the question, for appellants' antitrust claim is precisely that, on the one hand, they have no practical choice but to remain in the Society and, on the other, that the dominance of the large

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